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# REPORTS OF CASES

DETERMINED BY

# THE SUPREME COURT

OF THE

# STATE OF NEVADA

DURING OCTOBER TERM, 1915, AND JANUARY,  
APRIL, AND JULY TERMS, 1916

REPORTED BY

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CLERK OF SUPREME COURT

AND

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## VOLUME XXXIX

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**REPORTS OF CASES**  
**DETERMINED IN**  
**THE SUPREME COURT**  
**OF THE**  
**STATE OF NEVADA**

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**OCTOBER TERM, 1915**

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[No. 2144]

**PETER ZELAVIN, RESPONDENT, v. TONOPAH  
BELMONT DEVELOPMENT COMPANY (A  
CORPORATION), APPELLANT.**

[149 Pac. 188]

**1. WITNESSES—CROSS-EXAMINATION—SCOPE.**

In a personal injury action, wherein one element of plaintiff's damages was inability to work, exclusion of evidence as to the name of a person from whom he borrowed a certain sum of money was erroneous.

**2. EVIDENCE—SIMILAR FACTS—INJURIES TO SERVANT—STATE MINING INSPECTION RULES.**

In a miner's action for injuries, rules posted at the mine, several months after the injury, by the state mining inspector, were not admissible in evidence by the mere fact that they were similar to the ones posted by defendant before the time of the injury.

**3. TRIAL—INSTRUCTIONS—MISLEADING INSTRUCTIONS.**

The giving of an instruction, although embodying a correct rule of law, is reversible error, where it has a tendency to mislead the jury.

**4. MASTER AND SERVANT—PLACE OF WORK—ASSUMPTION OF RISK.**

Where a servant is employed in performing labor which necessarily changes the character of the place for safety as the work progresses, and is consequently likely to become dangerous at any time, he assumes the risk.

VOL. 39—1

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Points decided

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## 5. MASTER AND SERVANT—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

In a miner's action for injuries from a falling rock, evidence held to make the question as to whether he himself loosened it one for the jury.

## 6. TRIAL—INSTRUCTIONS—REQUESTS—NECESSITY.

If a defendant in a personal injury action desires an instruction on the question of contributory negligence, he must request it.

## 7. TRIAL—INSTRUCTIONS—THEORIES OF CASE.

Where the parties on trial each proceeded on a different theory of the case, the court must give instructions applicable to both theories upon request.

## 8. TRIAL—INSTRUCTIONS—EVIDENCE TO SUPPORT.

In a miner's action for injuries by a falling rock, an instruction upon the fellow-servant doctrine is erroneous, where there is no evidence to support it.

## 9. TRIAL—INSTRUCTIONS—THEORIES OF CASE.

An instruction which takes from the consideration of the jury defendant's theory of the case is erroneous.

## 10. EVIDENCE—WEIGHT—CREDIBILITY OF WITNESS.

If the jury believe from the evidence that a witness has willfully sworn falsely as to material matters, they are at liberty to disregard his entire testimony, except as corroborated by other credible evidence.

## 11. TRIAL—INSTRUCTIONS—NECESSITY OF REQUESTS.

Since the defense of contributory negligence may be abandoned at any time during the trial, it is not obligatory upon the court to give instructions thereon, in absence of request.

## 12. TRIAL—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

A requested instruction, which is misleading, is properly refused.

## 13. COSTS—ATTENDANCE OF WITNESSES—MILEAGE.

Under Rev. Laws, sec. 5431, providing that no person shall be required to attend as a witness out of the county in which he resides, unless the distance be less than 30 miles from his residence, the mileage of witnesses residing in another county more than 30 miles from the place of trial cannot be taxed as costs.

## 14. COSTS—WITNESS FEES—AUTHORITY TO TAX.

Witness fees may only be taxed when expressly allowed by legislative enactment.

## 15. COSTS—WITNESSES—PER DIEM.

Although a party is not entitled to tax mileage on account of witnesses attending court out of the county, he may nevertheless recover their per diem for the days they were upon the witness stand.

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Argument for Appellant

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## 16. COSTS—WITNESSES—MILEAGE.

Where it does not appear on a motion to retax cost that witnesses from a foreign state were not served at the state line, their mileage may be recovered from such line.

APPEAL from Second Judicial District Court, Washoe County; *Cole L. Harwood* and *A. N. Salisbury*, Judges.

Action by Peter Zelavin against the Tonopah Belmont Development Company for personal injuries. From a judgment for plaintiff, defendant appeals. **Reversed**, and new trial granted.

*H. H. Brown*, *J. H. Evans*, and *H. R. Cooke*, for Appellant:

It is clearly a case in which the plaintiff was working in a place where his work changed the character of the place; it was clearly his duty to make the place safe for himself. (*White*, Personal Inj., sec. 41; *Finlayson v. Mining Co.*, 67 Fed. 507; *Cons. Coal Co. v. Clay*, 38 N. E. 610, 25 L. R. A. 848-56; *Browne v. King*, 100 Fed. 561-71; *Anderson v. Daly M. Co.*, 50 Pac. 815; *Allen v. Logan*, 37 Pac. 496.)

Damages cannot be recovered for increased injuries due to unskilful treatment by a physician called by plaintiff. (13 Cyc. 77; *Harney v. Ry. Co.*, 165 Ill. App. 547; *Gray v. Ry. Co.*, 102 N. E. 71; *Railway Co. v. Saxby*, 68 L. R. A. 164; *Barry v. Greenville*, 65 S. E. 1030; *Goss v. Goss*, 113 N. W. 690.)

Only so much of the testimony of a witness who has wilfully and knowingly sworn falsely on a material point in the case as is not corroborated by other witnesses, or by facts and circumstances, may be rejected by the jury. (*People v. Hucks*, 53 Cal. 354; *People v. Progue*, 53 Cal. 491.)

If the negligence of an employee be gross and that of the employer slight in comparison, such gross negligence shall bar recovery. (Rev. Laws, 5650-5651; *Lawson v. Halifax*, 38 Nev. 138; *Ward v. Pittsburg Silver Peak*, 37 Nev. 470.)

Where an employee, knowing of a danger, continues at work because he does not want to lose employment, he establishes an assumption of risk. (*Lawson v. Amer. Axe*

## Argument for Respondent

Co., 83 Am. St. Rep. 267; *Southern Ry. Co. v. Moore*, 31 Pac. 138; *Leary v. Boston Co.*, 52 Am. St. Rep. 733; *Atchison Ry. Co. v. Schroeder*, 27 Pac. 963; *Reed v. Stockmeyer*, 74 Fed. 186.)

The court erred in refusing to retax costs. (Rev. Laws, 5431; *Butcher v. Vaca Co.*, 56 Cal. 598; *Naylor v. Adams*, 114 Pac. 997; *Carr v. Stern*, 120 Pac. 35.)

*Dixon & Miller*, for Respondent:

The court properly refused to permit a question as to the name of the person from whom plaintiff testified he borrowed \$500. It had no bearing upon the question as to whether he did or did not work subsequent to the injury, or whether he was incapacitated from working. The question was asked upon cross-examination as to matter brought out upon cross-examination, and therefore was not proper. Cross-examination must be confined to matters brought out on direct examination. (40 Cyc. 2501, 2512, 2484; *Coonan v. Lowenthal*, 61 Pac. 940; *Parkin v. Grayson-Owen Co.*, 106 Pac. 210; *Clukey v. Seattle Electric Co.*, 67 Pac. 379; 17 Am. & Eng. Ann. Cas. 4-9.)

No matter how experienced the employee may be, he never assumes more than the ordinary risks incident to his employment; and it clearly appears from the evidence that the dangerous condition of the rock which fell and caused the injury was not apparent to plaintiff, or that he had any realization of danger. (*Williams v. Sleepy Hollow M. Co.*, 11 Am. & Eng. Ann. Cas. 111.)

An employee does not, in any case, assume the risk of the master's negligence. (*Choctaw-Oklahoma & G. Ry. Co. v. Jones*, 7 Am. & Eng. Ann. Cas. 431.)

The burden of proof is upon the defendant to show contributory negligence. (*St. L. I. M. & S. Ry. Co. v. Jackson*, 8 Am. & Eng. Ann. Cas. 328; *Linforth v. S. F. Gas & E. Co.*, 19 Am. & Eng. Ann. Cas. 1230.)

The servant has the right to assume in the first instance that the place is safe, and it is for the defendant to show either knowledge or excusable ignorance.

## Argument for Respondent

(*Calloway v. Agar Packing Co.*, 104 N. W. 720; 17 L. R. A. n. s. 76-85.)

On all questions involved concerning instructions, it is contended that: "It is the duty of the master to provide a safe place to work, and to give warning as to all dangers not obvious. This applies not only to appliances which the master had knowledge of, but also to such defects as he could have by exercising reasonable care." (*Ago v. Harback*, 117 N. W. 671; *St. Louis Ry. Co. v. Birch*, 89 Ark. 424, 28 L. R. A. n. s. 1250; *Marks v. Harriett Cotton Mills*, 3 Am. & Eng. Ann. Cas. 812.)

It is the duty of defendant to prove by a preponderance of evidence that plaintiff knew and appreciated the peril to which he was exposed. (*Curkovitch v. Thistle Coal Co.*, 121 N. W. 1036.) A risk which is unknown to employees is not assumed. (*Long v. Johnson*, 134 Iowa, 336.) The burden of showing the assumption of risk rests with the employer. (*Martin v. Edison Light Co.*, 131 Iowa, 263.) Plaintiff does not assume what he does not know about. (*Calloway v. Agar P. Co.*, 129 Iowa, 1; *Mace v. Boedker*, 127 Iowa, 721.) It is the duty of the master to make proper inspection of place of work and to repair any defects. (*Delaney v. F. G. etc.*, 88 N. E. 773; *LaBatt, Master and Servant*, sec. 28; *Hogarth v. Pacasset Man. Co.*, 45 N. E. 629; *Lawton v. Oglesbee Coal Co.*, 154 Ill. App. 368.)

A witness is bound to obey a subpoena directed to him, no matter by what means it comes into his hands. (*Chicago A. R. Co. v. Dunning*, 18 Ill. 494.) A witness does not lose his right to mileage and per diem by not insisting on prepayment. (*Young v. M. Ins. Co.*, 29 Fed. 273.) A person who accepts service of a subpoena is entitled to fees for attendance. (*McHoney v. Kerwin*, 56 Mo. App. 459.) The court may allow fees to a witness who attends simply on request. (*Commonwealth v. Smith*, 4 Pa. Co. Cy. R. 321; *U. S. v. Williams*, Fed. Cas. No. 16709; *Eastman v. Sherry*, 37 Fed. 844; *Pinson v. Atch. T. & S. F. Co.*, 54 Fed. 464; *Burrow v. Kansas City R. Co.*, 54 Fed. 278; *LaGrosse v. Curran*, 10 Phila. 140.)

By the Court, COLEMAN, J. :

On July 21, 1913, the defendant, being desirous of enlarging a station on the 1300-foot level of its mine at Tonopah, sent the plaintiff, an experienced machine man, to the place, with instructions to do certain work. He drilled all of that day, and just before going off shift fired the holes. The next day he was set to work 25 or 30 feet from where he had worked on the 21st, and after drilling one hole and about a couple of inches of another a rock slid down and injured him. He was taken to the surface, where he received "first-aid treatment" from a doctor who, he alleges, rendered the services at the request of the defendant. Plaintiff protested against this doctor treating him, but finally submitted, after which he left the mine. The next day he employed another doctor, who then discovered that the arm was infected.

Plaintiff brought suit in the Second judicial district court, in and for Washoe County, to recover damages for his alleged injuries. The complaint stated two causes of action; the first being for injuries received in the mine for alleged negligence of defendant for failure to provide a reasonably safe place in which to work, and the second for alleged negligence in furnishing plaintiff an unskilled and negligent doctor to give him "first-aid treatment." The answer denied all the allegations of negligence, and pleaded assumed risk and contributory negligence on the part of plaintiff, to which there was a reply. There was a trial before a jury, which brought in a verdict for the plaintiff. Judgment was rendered on the verdict, and defendant appeals.

1. It is contended that the trial court erred in sustaining an objection to a question as to the names of the persons from whom plaintiff testified he had borrowed \$500. It was plaintiff's contention at the trial that he had been unable to work since he was injured, and that he borrowed this sum to live upon. His inability to work was urged as a proper matter for the consideration of the jury in fixing damages, and as the testimony was material on that point the defendant was



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Opinion of the Court—Coleman, J.

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entitled to know the names of the persons of whom plaintiff claimed to have borrowed the money; for, if it could have been shown that he did not in fact borrow the money, it would have tended to discredit his testimony to the effect that he had been unable to work. The objection should not have been sustained.

2. The court did not err in sustaining plaintiff's objection to Defendant's Exhibit 3, which was a set of rules promulgated and posted at the mine, several months after the injury, by the state mining inspector. The mere fact that these rules were similar to ones posted by defendant did not justify their admission, to show the reasonableness of the rules posted by defendant. The defendant's theory is that it had a right to call the mining inspector to testify, and consequently should have been permitted to introduce the rules which he had promulgated. Unquestionably defendant had the right to call the mining inspector as a witness; but in that event plaintiff would have had a right to cross-examine him as to his experience and knowledge of mining, which could not have been done if the exhibit had been admitted.

3. Plaintiff's second cause of action, which was based upon the alleged negligence of the doctor in giving the "first-aid treatment," was voluntarily dismissed by plaintiff; but, notwithstanding the dismissal, the court, at plaintiff's request and over defendant's objection, instructed the jury that, if it found that plaintiff was injured through the negligence of the defendant, the defendant was not relieved of liability because of the fact that the injuries had been increased through the negligence of the doctor who gave the "first-aid treatment." While the rule of law declared by the instruction is correct, we think that in view of all the circumstances the instruction may have misled the jury, and it should not have been given. With the second cause of action out of the case, it would have been simple enough to instruct the jury that, if plaintiff was injured through the negligence of the defendant, plaintiff was entitled to recover damages actually sustained by reason of the defendant's

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negligence. Had plaintiff been injured by a runaway team while being taken to the hospital, through no fault of defendant, it would not have been necessary for the court in its instructions to allude to the injury received by plaintiff while on his way to the hospital, and to have done so would have been error. Yet the two cases are similar, except that the one in question in the case at bar is likely to have been more prejudicial than an instruction in the supposed case could possibly be.

4. In seeking to reverse this case, while the appellant concedes that it is a general rule that a master must furnish his servant a reasonably safe place in which to work, considering the nature of the work to be done, it is contended that the work which plaintiff was employed in doing changed the character of the place of work as the work progressed, and consequently plaintiff must be held to have assumed the risk. It is unquestionably the rule that where a servant is employed in performing labor which necessarily changes the character of the place for safety where the work is being done as the work progresses, and consequently is likely to become dangerous at any moment, he assumes the risk. (1 Bailey on Per. Injury, 2d ed. p. 230; *Finlayson v. Mining Co.*, 67 Fed. 507, 14 C. C. A. 492; *Holland v. Durham C. & C. Co.*, 131 Ga. 715, 63 S. E. 290; *Heald v. Wallace*, 109 Tenn. 346, 71 S. W. 80; *Cully v. N. P. Ry. Co.*, 35 Wash. 241, 77 Pac. 202; *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1021; *Con. Coal Co. v. Clay*, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 856; White on Per. Inj. in Mines, sec. 41; *Browne v. King*, 100 Fed. 561, 40 C. C. A. 545; *Moon Anchor M. Co. v. Hopkins*, 111 Fed. 298, 49 C. C. A. 347; *Kentucky Block Coal Co. v. Nance*, 165 Fed. 46, 91 C. C. A. 82.)

5. While we agree with appellant as to the correctness of the rule invoked, yet if the rock which injured plaintiff was loose and dangerous when he went to the station on July 21 to go to work, and was not in fact loosened by the very work which the plaintiff was doing, plaintiff would, beyond doubt, be entitled to recover. Plaintiff testified that the shots which he put in on July 21 were not

loaded heavily enough to loosen the rock ten feet away. The question is: Was the rock which slid down and injured the plaintiff loose and dangerous before he went to the station to work, or did he make it loose and dangerous by the work which he did? If it was the former, the defendant is liable; if the latter, the plaintiff cannot recover. Under the evidence in the case it is not a question of law for the court to determine, but one of fact for the jury. (*Miller v. Bullion-Beck*, 18 Utah, 358, 55 Pac. 59; *Schlacker v. Mining Co.*, 89 Mich. 253, 50 N. W. 839; *Railway Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745; *Jones v. Railway Co.*, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 409, 12 Sup. Ct. 679, 36 L. Ed. 485; *Ill. Cent. Railway Co. v. Foley*, 53 Fed. 459, 3 C. C. A. 589; *Habishaw v. Standard*, 131 Cal. 430, 63 Pac. 728.)

While plaintiff's instruction No. 1 may be a correct statement of the law, it is so worded that it might have been confusing to the jury. In the rush incident to a jury trial the court is prone to accept instructions prepared by attorneys when they are substantially correct. The matter covered by this instruction should have been stated in such a way as to leave no doubt as to its effect upon the jury.

6. The mere fact that plaintiff's instruction No. 3 did not cover the alleged contributory negligence of plaintiff is not error. If defendant desired an instruction on that point, it should have requested it, and, if proper, a refusal to give it would have been prejudicial error.

7. The court did not err in its instruction No. 5. While it was the duty of the court to have instructed more fully upon the request of the defendant, the instruction was correct in stating that it was defendant's duty to provide a reasonably safe place for the plaintiff to work in. The plaintiff proceeded upon one theory and the defendant upon another. Under such circumstances the court should give instructions applicable to both theories, upon request; but it is certainly not incumbent upon the plaintiff to request instructions applicable to defendant's theory, and, while the court may of its own motion give instructions, its failure to do so is not error.

Instruction No. 8 is not subject to the objection made.

Of course, it is erroneous, should we accept defendant's theory as being established by the evidence; but, since the jury might have found the facts to be as contended by plaintiff, it was certainly proper.

8. We think instruction No. 10 should not have been given. It undertakes to instruct as to the fellow-servant doctrine. There is no evidence in the case upon which to base such an instruction. If it were shown that a fellow servant had made the station and left it in a dangerous condition, and because thereof plaintiff was injured, the instruction would be applicable; but there is no such evidence. So far as appears from the evidence, the station was made long prior to the time when plaintiff went to work in the mine.

9. We think instruction No. 11 was erroneous. While it is true that it was the duty of defendant to furnish plaintiff with a reasonably safe place in which to work, having due regard for the nature and character of the work, the instruction practically takes from the consideration of the jury defendant's theory of the case, which it should not have done. It should simply have stated the law as applicable to the case from the theories of both sides, and let the jury find the facts and apply the law as given in the instructions to the facts as found.

In the opinion of this court, instruction No. 13 should not have been given. The evidence does not show that the timbering was done in the manner in which it was for the purpose of saving money. While it may have been economical to put in the timbers in the manner in which they were, testimony to that effect is very far from saying that they were put in as they were because it was cheaper to do it in that manner. There was no evidence upon which to base the instruction.

10. Appellant complains of instruction No. 14, relative to the wilful giving by a witness of false testimony. In view of the fact that the case must be reversed, all we need to say is that this court, in *State v. Burns*, 27 Nev. on page 293, 74 Pac. on page 984, approved of the following instruction:

"You are further instructed that, if the jury believe from the evidence that any witness has wilfully sworn falsely on this trial as to any matter or thing material to the issues in this case, then the jury are at liberty to disregard his entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts or circumstances proved on the trial."

We recommend it as one safe to follow. See *Williams v. State*, 9 Okl. Cr. 206, 131 Pac. 183.

11. Instruction No. 25 was taken from section 5651, Revised Laws, and is correct, so far as it goes. Contributory negligence, as we have said, is an affirmative defense, and if pleaded may be abandoned at any time. If the defendant did not see fit to ask for any instruction on contributory negligence, it was not obligatory upon the court to give it upon its own motion.

Appellant urges that the court erred in not giving its requested instruction No. 2. This requested instruction is based upon the theory that plaintiff was engaged in making a dangerous place safe. There is nothing in the evidence to justify such an instruction.

Defendant's requested instruction No. 5 was properly refused, for the reason that there was no evidence upon which to base it.

12. The court did not err in declining to give defendant's requested instruction No. 4. The instruction was misleading. There was no evidence tending to show that the plaintiff was employed in making a known dangerous place safe. This requested instruction is substantially the same as requested instruction No. 2.

13. Plaintiff filed a cost bill, and defendant made a motion to retax costs. Two items of the cost bill were for mileage and per diem of witnesses subpoenaed in Tonopah, Nye County, Nevada, 244 miles from Reno, where the case was tried. The lower court refused to retax the cost on these two items. Defendant contends that, since section 5431, Revised Laws, provides that "no person shall be required to attend as a witness before any court, judge, justice, referee, or other officer, out of

the county in which he resides, unless the distance be less than thirty miles from his place of residence to the county of trial," the witnesses were not "required" to attend upon the trial, since they resided in another county and more than thirty miles distant, and could not be punished for contempt for refusal to obey the subpoena, and therefore plaintiff was not entitled to these items as a part of his costs.

14. Witness fees were not paid at common law (40 Cyc. 2181; *Meagher v. Van Zandt*, 18 Nev. 230, 2 Pac. 57); consequently witness fees can be taxed only when expressly allowed by legislative enactment. It was also said in the *Meagher* case, *supra*, "that such fees are limited to witnesses who have been *required* to attend." And it was also held in the case mentioned that one was "required" to attend as a witness only when service of subpoena was made upon him. Under the interpretation of the word "required" in that case, it would seem that the witnesses were not required to attend from Tonopah, and consequently these two items should have been disallowed. While Chief Justice Hawley filed a dissenting opinion in the *Meagher* case, there are numerous authorities sustaining the position of the court, among which are: *Thompson v. Hodges*, 10 N. C. 318; *Clark v. Linsser*, 1 Bailey (S. C.) 187; *Hopkins v. Waterhouse*, 2 Yerg. (Tenn.) 230; *Sapp v. King*, 66 Tex. 570, 1 S. W. 466; *Sawyer v. Aultman & T. Co.*, 5 Biss. 165 Fed. Cas. No. 12379; *Goodwin v. Smith*, 68 Ind. 301; *Fuller Buggy Co. v. Waldron*, 49 Misc. Rep. 278, 97 N. Y. Supp. 730; *Haines v. McLaughlin*, 29 Fed. 70, 12 Sawy. 126; *Lillienthal v. So. Cal. R. Co.* (C. C.) 61 Fed. 622; *Woodruff v. Barney*, Fed. Cas. No. 17986; *Fisher v. Burlington*, 104 Iowa, 588, 73 N. W. 1070; *Mylius v. St. Louis Ry. Co.*, 31 Kan. 232, 1 Pac. 619; *Butcher v. Vaca Co.*, 56 Cal. 598, 599; *Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997, 998; *Carr v. Stern*, 17 Cal. App. 397, 120 Pac. 35-40.

15. While we are of the opinion that respondent is not entitled to recover mileage on account of the two witnesses who attended from Tonopah, we are of the opinion that he

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should recover their per diem for the days they were upon the witness stand.

16. Two items in the cost bill are for witnesses who came from California. It is true that their mileage is taxed only for the distance from the state line. No subpoena could have compelled them to come from California; but, since it was not shown on the hearing of the motion to retax costs that they were not served at the state line, we will not disturb these items.

The case of *State v. Gayhart*, 26 Nev. 278, 68 Pac. 113, is not in point on the motion to retax. The point decided in that case was that an acceptance of service of subpoena was of the same legal effect as service by an officer.

It appearing that prejudicial error was committed by the trial court, it is ordered that the case be reversed, and a new trial granted.

*Per Curiam:*

Petition for rehearing denied.

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Points decided

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[No. 2162]

**J. H. DALY, APPELLANT, v. LAHONTAN MINES COMPANY (A CORPORATION), ET AL., RESPONDENTS.**

[151 Pac. 514; 158 Pac. 285]

**1. APPEAL AND ERROR—APPEAL ON JUDGMENT ROLL—STATUTE.**

By direct provision of Rev. Laws, sec. 5338, a party may appeal on the judgment roll alone.

**2. JUDGMENT—COLLATERAL ATTACK—JURISDICTION.**

A collateral attack upon a judgment is only permissible when the judgment is void for want of jurisdiction, and not if the court merely errs in some ruling.

**3. CORPORATIONS—FOREIGN CORPORATIONS—SERVICE OF PROCESS—STATUTES—"AGENT OR OTHER HEAD"—"AGENT."**

Comp. Laws, 3124, provides that service of process against a foreign corporation doing business within the state may be made on an agent, cashier, secretary, president, or other head thereof. Section 899 provides that every foreign corporation doing business in the state shall appoint an agent upon whom all legal process may also be served. In an action to enforce a mechanic's lien against a foreign corporation, service was made on its manager, who had not been appointed its agent therefor. *Held*, that such service was valid under section 3124, which was in force at the passage of section 899, since the manager of a corporation is such an agent or "other head" of a company as is contemplated by the statute; an "agent" being one who has authority to act for another.

**4. QUIETING TITLE—BASIS OF ACTION—TITLE.**

Plaintiff, not claiming any title to realty, but seeking a decree directing that a sheriff convey to him real property sold under a judgment, the plaintiff being the purchaser's successor, cannot maintain an action to quiet title, which is based on the presumption that plaintiff has title.

**5. MECHANICS' LIENS—RIGHT OF REDEMPTION FROM JUDGMENT.**

Two judgments were entered against a corporation in separate mechanic's lien actions, and the property sold under each judgment. The successor of the purchaser under the second judgment lost his right to the property as a redemptioner, when he failed to redeem from the first judgment within the statutory time, and before the issuance of the sheriff's deed to the purchaser thereunder.

**6. MECHANICS' LIENS—PRIORITY—WAIVER.**

Revised Laws, sec. 2223, provides that, wherever liens are asserted against any property, the court in the judgment must declare their rank, placing liens for labor first. Section 2227 provides that, at the time of filing the complaint and issuing the summons in a lien action, the plaintiff shall notify all persons claiming liens on the premises to exhibit proof of their liens to the court. A mechanic's lienor for labor failed to exhibit his lien in a prior lien suit. *Held* that, so far as the



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Points decided

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plaintiffs in such suit and those who did exhibit their liens were concerned, he had waived his right under the statute to priority as a labor lienor.

### ON REHEARING

#### 1. EQUITY—MAXIMS—APPLICATION.

Though equity considers that done which should have been done, it does not follow that an equitable right once existing will always exist; but, to avail oneself of such right, it must be asserted in apt time and diligently prosecuted.

#### 2. MECHANICS' LIENS—CONSTRUCTION OF STATUTE.

While the mechanics' lien law should be liberally construed, it is a creature of statute; and, to enable one to acquire and enforce a right under it, there must be a substantial compliance with the statute.

#### 3. CONTINUANCE—ENFORCEMENT OF MECHANICS' LIEN.

Under Rev. Laws, sec. 2227, providing that, at the time of filing the complaint and issuing the summons in a lien action, the plaintiff shall notify all persons claiming liens to exhibit proof, and that all liens not exhibited shall be deemed to be waived in favor of those exhibited, where lien claimants sued to enforce their lien, and gave proper notice to other claimants to exhibit their liens, and other claimants, who had an opportunity to exhibit their liens and had elected to institute an independent suit, appeared by attorney and stated that the other suit was pending for the foreclosure of their liens, and that at the proper time they would appear and join in the foreclosure, the court very properly refused the claimants' continuance.

#### 4. JUDGMENT—COLLATERAL ATTACK—ERROR IN JURISDICTION.

Where the court had jurisdiction both over the subject-matter and the defendant in a mechanic's lien suit, its failure to enter an order consolidating with the suit a subsequent suit against the same defendant was merely an error in the exercise of jurisdiction, if it was the duty of the court so to consolidate, which could be asserted on appeal only, and not in an independent action.

#### 5. APPEAL AND ERROR—QUESTIONS REVIEWABLE.

Where the case is before the supreme court on appeal from an order sustaining demurrer to the complaint, the court cannot look back of the complaint to ascertain the facts.

#### 6. MECHANICS' LIENS—ENFORCEMENT—CONSOLIDATION OF SUITS—STATUTE.

Under Rev. Laws, sec. 2224, relating to consolidation of lien claims, a lien suit instituted by a labor lien claimant, in which others joined, should have been consolidated with other and prior suits against the same defendant.

#### 7. MECHANICS' LIENS—PRIORITY—STATUTE.

By Rev. Laws, sec. 2223, labor liens are preferred claims, and entitled to be paid out of the proceeds of the sale of the property in advance of other classes of lien claimants.

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Argument for Appellant

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## 8. MECHANICS' LIENS—PROTECTION OF CLAIMANTS.

Trial courts, in actions to foreclose liens, where it appears there are other lien claimants and particularly that other suits are pending for the foreclosure of such other liens, should endeavor to protect the rights of all claimants in one judgment.

## 9. MECHANICS' LIENS—PROTECTION OF CLAIMANTS.

The procedure under the mechanics' lien statute should be liberal to the end of protecting the rights of all lien claimants.

## 10. MECHANICS' LIENS—FORECLOSURE—CONSOLIDATION OF ACTIONS—CONTINUANCE.

In suit to foreclose liens, the court of its own motion, could have consolidated all lien actions pending, heard the proofs in the first action, and granted reasonable continuance for hearing of proofs in the others.

## 11. MECHANICS' LIENS—WAIVER—STATUTE.

Under Rev. Laws, sec. 2227, providing that, at the time of filing the complaint and issuing the summons in a lien action, the plaintiff shall notify all persons claiming liens to exhibit proof, and that all liens not exhibited shall be deemed to be waived in favor of those exhibited, in an original lien suit, where no proofs were offered of liens involved in another and subsequent lien suit, no request made for consolidation of suits, and no appeal taken from the order refusing a continuance to the other lien claimants for the presentation of proofs, there was a waiver in favor of the liens involved in the original suit.

APPEAL from the First Judicial District Court, Lyon County; *Frank P. Langan*, Judge.

Action by J. H. Daly against the Lahontan Mines Company and others. Judgment for defendants, and plaintiff appeals. **Affirmed.**

*J. H. Daly and John Lothrop*, for Appellant:

The complaint is in the nature of a bill in equity, the sufficiency of which is attacked by general demurrer. If any matter set forth is proper for equitable relief, the demurrer should have been overruled. (16 Cyc. 272.) Equity will always entertain jurisdiction of actions to quiet title, because of the fuller remedy afforded. (32 Cyc. 1305.)

Under our statutes, the setting forth of a mere general claim to real property against which the defendants claim

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adversely would state a cause of action which ought to be determined by a hearing of the facts. (Rev. Laws, 5514.)

Appellant has a right in the property as a redemptioner, and is entitled to have this right legally determined. (*Whitney v. Higgins*, 10 Cal. 547; 27 Cyc. 347-350, 362; 36 L. R. A. n. s. 427.)

Appellant has a superior right to the property involved, the statutory distinction having been fixed as between liens for labor and material. (Rev. Laws, 2223.)

Section 2227, Revised Laws, requiring that all existing liens against property involved in a lien action be exhibited to the court at the time of the commencement of the action, is unconstitutional. (*Lonkey v. Keyes*, 21 Nev. 312; *Scorpion M. Co. v. Marsano*, 10 Nev. 370; *Coscia v. Kyle*, 15 Nev. 395.)

*Mack & Green*, for Respondents:

Section 2227, Revised Laws, is distinct, clear, and emphatic, and measures precisely the rights of the appellant's assignors. (*Hunter v. Truckee Lodge*, 14 Nev. 24; Bloom on Mechanics' Liens, sec. 627; *Skyrme v. Occidental M. & M. Co.*, 8 Nev. 231; *Mars v. McKay*, 14 Cal. 128.)

All the facts from which the legal conclusion must be drawn appear in the complaint. The demurrer to the sufficiency of the complaint was properly sustained.

By the Court, COLEMAN, J.:

This is an appeal from a judgment for costs in favor of defendants, respondents herein, following an order sustaining a general demurrer to appellant's complaint.

The complaint alleges that during the year 1910 the Ramsey Comstock Mining Company, a foreign corporation, was engaged in mining in Lyon County, and became indebted to numerous persons. That on November 11, 1910, one John Topogna commenced an action in the district court of Lyon County to foreclose a mechanic's

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lien; that on the same day a similar suit was commenced by one M. G. Gardella, and that the two actions were consolidated; that on the 12th day of that month a summons was issued in said consolidated action and placed in the hands of the sheriff for service; that his return was as follows:

"I hereby certify that I received the within summons on the 12th day of November, A. D. 1910, at 4 o'clock p. m., and duly served the same by personally delivering a true copy thereof attached to a certified copy of the complaint to A. H. Mayne, manager of said Ramsey Comstock Mining Company, in Lyon County, on the 4th day of November, 1910, by delivering to him a true copy thereof, and by showing him this original."

It also appears from the complaint that notice was published, according to law, notifying all persons having liens upon the property against which said Topogna and Gardella liens were sought to be foreclosed to exhibit proof of same before the district court on December 17, 1910. The section of the statute requiring the notice is Rev. Laws, 2227, and reads:

"\* \* \* And at the time of filing the complaint and issuing the summons the plaintiff shall cause a notice to be published at least once a week, for three successive weeks, in one newspaper published in the county, and if there is no newspaper published in the county, then in such mode as the court may determine, notifying all persons holding or claiming liens under the provisions of this act on said premises, to be and appear before said court on a day specified therein, and during a regular term of such court and to exhibit then and there the proof of their said liens. \* \* \*"

It also appears from the complaint that, notwithstanding the Topogna-Gardella suit, and the notice given in that case to lien claimants, on December 1, 1910, one William Ross commenced a suit in the same court against the Ramsey Comstock Mining Company to foreclose certain labor liens, in which case service of summons was made upon the defendant company the same day, and that

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notice was published according to law (quoted *supra*), notifying all lien claimants to exhibit their claims in said suit on or before January 5, 1911, pursuant to which notice several claimants exhibited their claims. On January 20, 1914, the defendant having failed to appear in the consolidated suit of Topogna and Gardella, its default was entered, and on that day the court entered judgment in favor of the plaintiffs, and against the defendant, Ramsey Comstock Mining Company. In the suit of Ross against the Ramsey Comstock Mining Company the default of the company was entered March 8, 1911, and on the same day judgment was entered by the court in favor of Ross and against the company.

It is further alleged that during the month of February, 1911, the sheriff of Lyon County sold the property in question under an order of sale in the case of *Topogna et al. v. Ramsey Comstock Mining Company*, and that the plaintiffs in the case were the purchasers, and that the certificate of sale was assigned to the defendants, C. E. Mack and George Green, to whom it is alleged a sheriff's deed issued conveying the property, and that the defendant, the Lahontan Mines Company, claimed to own the property in question, pursuant to a conveyance from Mack and Green. It is also alleged that by virtue of an order of sale made by the court in the case of *Ross v. Ramsey Comstock Mining Company*, the sheriff of Lyon County, on the 18th day of April, 1911, sold the property to William Ross, after having given due and legal notice of the sale, and on said last-named day issued to him a certificate of sale for said property; that on the 21st day of September, 1911, said C. E. Mack and George Green instituted an action in the district court of Lyon County against D. P. Randall, as sheriff of said county, to restrain him from issuing a sheriff's deed to said William Ross to said property, pursuant to the certificate of sale last mentioned; and that thereafter judgment and decree was entered in favor of said Mack and Green, and against said Randall, as such sheriff, permanently enjoining him from issuing such deed. It is further alleged that appellant

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was, at the time of the commencement of this action, the owner of the certificate of sale which was issued to said Ross, and of all rights thereunder. No appeal was taken in any of the cases mentioned herein.

1. Respondents, in apt time, made a motion to dismiss this appeal on two grounds: (1) Because no statement on appeal was served, as provided by section 5331, Revised Laws, and (2) because the transcript of the record was not filed in this court within the time allowed. Section 5338, Revised Laws, provides:

"\* \* \* A party may appeal upon the judgment roll alone, in which case only errors can be considered which appear upon the face of such judgment roll."

Section 5273, Revised Laws, provides that the judgment roll shall consist of:

"1. \* \* \* 2. \* \* \* The pleadings, \* \* \* and a copy of any order made on demurrer, \* \* \* and a copy of the judgment. \* \* \*"

A judgment roll, properly certified to, has been filed in this court, together with a copy of the notice of appeal from the judgment. On the oral argument it was stated that appellant sought to appeal upon the judgment roll only, and since there is no contention that the purported judgment roll is defective, and since the statute expressly says that an appeal may be taken thereupon, it follows that the motion to dismiss the appeal must be denied.

Several grounds are urged why the judgment appealed from should be reversed, the ones most strongly urged being: (1) Because there was no court in session on the 17th day of December, 1910, the day fixed in the notice in the case of *Topogna and Gardella v. Ramsey Comstock Mining Company* for other lien claimants to exhibit the proof of their liens; (2) because, when the court convened on January 20, 1911, it refused to grant further time to William Ross in which to exhibit his lien; and (3) because the judgment in the case of *Topogna and Gardella v. Ramsey Comstock Mining Company* is void for the want of jurisdiction, for the reason that there was no proper service upon defendant, Ramsey Comstock Mining

Company, and that it did not appear and submit itself to the jurisdiction of the court.

2. If we have correctly stated the points upon which appellant seeks to reverse the case, it will be seen that this suit is a collateral attack upon the judgment in the *Topogna-Gardella* case. We think it is an elementary rule that a collateral attack upon a judgment can be sustained only when a judgment is absolutely void for want of jurisdiction, and not when the court has erred in some ruling. (23 Cyc. 1055.)

The matters complained of under points 1 and 2, above stated, do not go to the jurisdiction of the court, and hence cannot be considered in this case.

3, 4. The third point is one which goes to the jurisdiction of the court to render the judgment in the case of *Topogna and Gardella v. Ramsey Comstock Mining Company*. In support of appellant's contention it is urged that the return of the sheriff shows affirmatively that service was made upon one whom the law does not recognize as a person upon whom service can be made for a foreign corporation. The service was made upon "A. H. Mayne, Manager of said Ramsey Comstock Mining Company." At the time of the service of the summons there were two acts which provided for the service of summons on a foreign corporation. One was "An act to require foreign corporations and associations to name and keep agents in this state upon whom all legal process may be served," approved February 25, 1889, being section 899, Cutting's Compiled Laws, which reads:

"Every incorporated company or association created and existing under the laws of any other state, or territory, or foreign government, or the government of the United States, owning property or doing business in this state, shall appoint and keep in this state an agent upon whom all legal process may be served for such corporation or association. Such corporation shall file a certificate, properly authenticated by the proper officers of such company, with the secretary of state, specifying the full name and residence of such agent, which certificate

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shall be renewed by such company as often as a change may be made in such appointment, or vacancy shall occur in such agency."

The other was section 29 of "An act to regulate proceedings in civil cases in the courts of justice of this state, and to repeal all other acts in relation thereto," approved March 8, 1869, being section 3124, Cutting's Compiled Laws, which reads:

"\* \* \* Second—If the suit be against a foreign corporation or a nonresident \* \* \* stock company or association, doing business within this state, to an agent, cashier, or secretary, president, or other head thereof."

We will concede, at the very outset, that if the provision which we first quoted had provided an exclusive method of making service of summons against a foreign corporation, the service of the summons would not have given the court jurisdiction. (*Karns v. State Bank & T. Co.*, 31 Nev. 170, 101 Pac. 564.) But the method therein provided was not exclusive, for it is expressly provided in section 3 of said act that "This act shall be [considered] as giving an additional mode and manner of serving process and as not affecting the validity of any service of process hereafter made, which would be valid under any statute now in force." (Comp. Laws, sec. 901.)

Since every presumption is indulged in favor of the validity of a judgment of a court of general jurisdiction, let us consider if the complaint in this case affirmatively shows that the court did not have jurisdiction in the case of *Topogna and Gardella v. Ramsey Comstock Mining Company*. The return of the sheriff shows that service was made by delivering a true copy of the summons and complaint to A. H. Mayne, manager of the Ramsey Comstock Mining Company. Since the statute said nothing about service being made on the "manager" of a corporation, the question is: Was the manager such an "agent" or "other head" of the company as contemplated by the statute? An "agent is one who has authority to act for another." (1 Words and Phrases, 262.) Surely one who is



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entrusted with the duty of managing the business of a corporation is an agent of the very highest order. We are of the opinion that the service upon the manager of the Ramsey Comstock Mining Company was valid legal service, and such as gave the court jurisdiction over the defendant in the case.

5. It is also contended that the complaint which appellant filed in the district court was sufficient in an action to quiet title. We think not. An action to quiet title is based upon the presumption that the plaintiff has title. Appellant does not claim in his complaint to have any title whatever, but alleges that the sheriff, defendant Randall, refuses to convey title to him, and prays that a decree be entered directing said defendant to convey the property to him. But it is said that if he has no such title as will sustain an action to quiet title, he has a right to the property as a redemptioner. His right of redemption expired when he failed to redeem from the Topogna-Gardella judgment within the time allowed by the statute and before the issuance of the sheriff's deed.

6. It is also contended that the judgment in the Ross case, being for labor (held under assignment by appellant), is a prior lien to the one in the Topogna-Gardella case, under the terms of section 2223, Revised Laws, which reads:

"In every case in which \* \* \* liens are asserted against any property, the court, in the judgment, must declare the rank of each lien, or class of liens, which shall be in the following order, viz: First—Labor. Second—All persons other than original contractors and subcontractors. \* \* \* "

It is clear from this section that it is meant that in each particular case (suit) the court in the judgment (in that suit) must declare the rank of the lien. When Ross failed to exhibit his lien in the Topogna-Gardella case he waived his rights (sec. 2227, *supra*) so far as Topogna and Gardella and those who did exhibit their liens in that case are concerned. (*Hunter v. Truckee Lodge*, 14 Nev. 24.) See, also, *Skyrme v. Occidental M. & M. Co.*, 8 Nev. 231;

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*Mars v. McKay*, 14 Cal. 128; Bloom on Mechanics' Liens, sec. 627.)

For the reasons given, the judgment is affirmed.

#### ON REHEARING

By the Court, COLEMAN, J.:

1. Upon the argument on rehearing it was not contended that we incorrectly stated any principle of law in the opinion; but it was strenuously urged that, in view of the fact that all labor liens were originally on an equal footing, nothing could have happened thereafter to give the claimants in the Topogna-Gardella cases a priority over the other claimants, relying apparently upon the broad equitable rule that equity considers that done which ought to have been done. But it must be remembered that in litigation, as in every pursuit, there must be an orderly method of procedure. A man may have an equitable right, but there is nothing to prevent his waiving it, and by a certain course of action being estopped from asserting it. It does not follow that because an equitable right once existed it will always exist. To avail oneself of an equitable right, it must be asserted in apt time and diligently prosecuted. In view of appellant's theory, the following language, from 10 R. C. L. 262, is of interest:

"In the preliminary discussion relative to the true nature of equity, emphasis was laid on its function as a corrective of proceedings at common law. But from this it must not be supposed that equity exercises a species of extraordinary jurisdiction, bounded by no certain limits or rules save those imposed by the individual conscience and natural sense of justice of the particular chancellor before whom a case is being tried. Doubtless, in the early history of English equity jurisprudence, there was much to justify the caustic criticism of the great Selden that 'Equity in law is the same that the spirit is in religion, what every one pleases to make it.' In the infancy of courts of equity, before their jurisdiction was settled, the chancellors themselves exercising

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a delegated authority from the crown, as the fountain of administrative justice, whose rights, prerogatives, and duties on the subject were not well defined and whose decrees were not capable of being resisted, undoubtedly acted on principles of conscience and natural justice without much restraint of any sort. Today, however, the rules and maxims of a court of chancery are as fixed and certain as those which govern inferior jurisdiction; and a court of equity has no more right than has a court of law to act on its own notions of what is right in a particular case, but must be guided by the established rules and precedents. Equity is flexible only as to circumstances in the modes of relief of which its forms render it capable; but otherwise the systems of jurisprudence in courts of law and equity are now equally artificial systems, founded on the same principles of justice and positive law, and their office is not to oppose but each in its turn to be subservient to the other. The discretion exercisable by a chancellor will, therefore, in some cases follow the law implicitly, in others assist it, and advance the remedy; in others again, it may relieve against the abuse, or possibly allay the rigor of it. But in no case does it contradict or overturn the ground or principles thereof, nor can a court of equity create new rights, not before existing at law, and then take jurisdiction to pass on and enforce them because the law affords no remedy."

2. While the mechanics' lien law should be liberally construed, it is purely a creature of the statute; and, to enable one to acquire and enforce a right under it, there must be a substantial compliance with the statute. No contention was made upon rehearing that the court had not acquired jurisdiction in the Topogna-Gardella case, nor can it be said that the court lost jurisdiction over the proceedings so that it could not render the judgment that was rendered in that case, unless the action on the part of the court in refusing to grant a continuance on January 20, 1911, had such effect. In the complaint it is alleged:

"Plaintiff further avers on his information and belief

that at the said hour (January 20, 1911), and at the time said causes of John Topogna and M. G. Gardella were brought to be heard, on the *ex parte* motion of said Mack & Green, attorneys for said persons, and before the trial of said causes proceeded, John Lothrop, Esq., appeared as the attorney of record of said William Ross and said W. J. Gruss, and then and there objected to further proceedings being had in said cause, until such time as the said William Ross and said W. J. Gruss could appear and join in the foreclosure of the several liens of record held by them, and for grounds of delay in the trial of said *ex parte* action, the court was informed by said attorney that another suit was then and there pending for the foreclosure of the several liens represented by said attorney, and that at the proper time the said persons would appear and join in the foreclosure of the said liens, against the same property for which foreclosure was then and there requested by Mack & Green; that the judge of said court, to wit, the Honorable Frank P. Langan, the judge of said court, then and there refused to sustain said objection of the said attorney; whereupon the said attorney asked and was granted an exception to the ruling of the court in said cause, on the grounds that another suit was pending for the same cause in said court, and that said court had no jurisdiction to enter a decree in said cause alone, and without bringing in all parties plaintiff therein."

3. What deduction must be drawn from this allegation? Bearing in mind that Topogna and Gardella had brought their suit in November, 1910, and had given proper notice to other claimants to exhibit their liens, and on January 20, 1911, appeared for the purpose of proving up their claims, and that other lien claimants having had an opportunity to exhibit their liens in the suit pending and having elected to institute an independent suit appeared in court by attorney and stated that "another suit was then and there pending for the foreclosure of the several liens represented by said attorney, and that at the proper time the said persons would appear and join in the foreclosure of the said liens, \* \* \*" was it the duty of the

court to do more than it did do? Topogna and Gardella, and other claimants who had exhibited lien claims in that suit, were in court and ready and anxious to make proof of their claims, while Ross and associates were objecting to the court hearing the evidence, and elected not to consolidate their claims with the other suit; basing their election and objection on the sole ground that that was not the "proper time" for them to do so. No further explanation or reason for their action was given; no time was stated when it would be "proper time" for them to join; they did not contend that it was impossible for them to make their proof at that time. They might elect to settle their claims out of court and assert perpetually that the proper time had not arrived. Certainly the court would not undertake to compel them to come in and offer testimony in support of their claims, when they clearly manifested a desire to adopt another course.

The statute (section 2227, Rev. Laws, partly quoted in the former opinion) had fixed the manner of bringing in other lien claimants and the time within which they should exhibit their claims, and also provided "\* \* \* and all liens not so exhibited shall be deemed to be waived in favor of those which are so exhibited." It is evident that the legislature had a purpose in providing this summary method of enabling lien claimants to become parties to an action, and for providing that all who did not exhibit their claims should be deemed to have waived them, so far as the plaintiff and those who did exhibit their claims were concerned.

4. It is not now contended that service in the Topogna-Gardella case was not a valid service. This being true, the court had jurisdiction over both the subject-matter and the defendant; and, even if it was the duty of the court to enter an order consolidating the Ross case with the Topogna-Gardella case, its failure to do so was only an error in the exercise of jurisdiction, and one which could be asserted on appeal only, and not in a proceeding of this character.

5. Counsel stated in his argument that there was no court on December 17, 1910, when the notice in the

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Topogna-Gardella case directed other lien claimants to exhibit their liens. But there is no allegation in the complaint to that effect; and the case being before us on appeal from an order sustaining a demurrer to the complaint, we cannot look back of the complaint to ascertain what the facts were; and for that reason, if for no other, there is nothing in that suggestion. That point seems to have been an afterthought on the part of counsel.

Having reached the conclusion that the court had jurisdiction at every stage of the proceedings in the Topogna-Gardella case, it follows that we cannot reverse the judgment of the lower court in the case at bar without overturning well-established principles of law. If we reverse this case, it will be tantamount to saying that a judgment is of no substantial force and effect; it would be a waste of time and effort to undertake to depict the consequences.

6, 7. Assuming, however, that the facts are as alleged in the complaint, it will not be out of place here, for the benefit of similar cases in the future, to say that a different course upon the part of court and counsel would have protected the rights of all and have avoided subsequent fruitless litigation with its attendant delay and expense. Unquestionably, the suit instituted by Ross and the other lien claimants joined therein should have been consolidated with the Topogna and Gardella suits. (Rev. Laws, 2224.) In the Ross suit were involved the greater number of labor liens, and the amount involved was greatly in excess of that involved in the Topogna and Gardella suits. The labor liens were preferred claims and entitled to be paid out of the proceeds of the sale of the property in advance of other classes of lien claimants. (Rev. Laws, 2223.)

8-11. It appears from the complaint in this action, that when the Topogna-Gardella case came on for hearing upon notice to all the lien claimants as required by the statute (Rev. Laws, 2227), counsel for claimant in the Ross suit asked for a continuance in order that his clients might present their proofs and excepted to the

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order of the court refusing the same. No appeal was taken from the judgment and order in that case, and whether or not the court erred cannot be determined now upon a collateral attack upon that judgment. The facts as they were presented to the court may, and upon collateral attack it is presumed they did, justify the order. We can only now say that trial courts, in actions to foreclose one or more liens, where it appears that there are other lien claimants, and especially where it appears that other suits are pending for the foreclosure of all or a portion of such other liens, should endeavor within all reasonable limitations to protect the rights of all lien claimants in one judgment. The purpose of the statute is to protect the rights of all lien claimants, and procedure should be extremely liberal to that end. The court of its own motion could have consolidated all the lien actions. It could have heard the proofs in the Topogna-Gardella cases and have granted a reasonable continuance for the hearing of the proofs in the other cases. As before stated, the manifest purpose of the lien statute justifies great liberality in a matter of this nature. Upon the other hand, the statute contemplates a summary procedure and provides that "all liens not so exhibited shall be deemed to be waived in favor of those which are so exhibited." (Rev. Laws, 2227.) Where no proofs were offered in the original suit of the liens involved in the Ross action, no request made for a consolidation, and no appeal taken from the order refusing a continuance, we see now no way to avoid the specific provisions of the statute which imposes a waiver in favor of the liens decreed to be foreclosed in the Topogna-Gardella judgment.

Perceiving no error in the order and judgment appealed from, it is ordered that the same be affirmed.

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## Points decided

[No. 2202]

IN THE MATTER OF THE APPLICATION OF FREDERICK  
OVERFIELD FOR A WRIT OF HABEAS CORPUS.

[152 Pac. 568]

## 1. HABEAS CORPUS—EXTRADITION—EXTENT OF REVIEW.

In hearing an application for *habeas corpus* seeking the petitioner's release from the custody of an agent of another state requisitioning the petitioner as a criminal, the court will go behind the executive warrant of such other state and inquire into the sufficiency of the papers constituting the requisition.

## 2. CRIMINAL LAW—PARTIES TO OFFENSES—ACCESSORY AFTER FACT—STATUTE—"HARBOR AND PROTECT."

Under Pen. Code Utah, sec. 4075, providing that persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor or protect the person charged therewith or convicted thereof, are accessories, where petitioner for *habeas corpus*, after a third person in Utah procured certain bonds from another by false pretenses, induced the defrauded person to delay the institution of criminal proceedings against the third person for a few days, during which the latter left the State of Utah, petitioner was not an accessory after the fact to the crime, since the words "harbor and protect" of the statute imply more than mere withholding of knowledge as to the whereabouts of the party charged, and necessarily contemplate some affirmative act or acts of concealment or assistance rendered to the principal personally; mere words of inducement or persuasion intended to cause a third party to delay filing a criminal charge not being enough to bring the party within the statute.

## 3. CRIMINAL LAW—PARTIES TO OFFENSE—ACCESSORY AFTER FACT.

The act of the petitioner in leaving Utah himself with the stolen bonds on his person did not render him an accessory after the fact to the crime of obtaining property by false pretenses.

## 4. HABEAS CORPUS—VOLUNTARY SURRENDER TO SHERIFF—EXTRADITION.

A petitioner for *habeas corpus* could surrender himself to a sheriff of a county of the state in order to protect himself from being summarily removed from the state on the requisition of the governor of another state by an agent of such other state without opportunity to appeal to the courts for review of the matters of law pertaining to the extradition, the agent of the other state to petitioner's knowledge having the intent so to remove him; therefore such petitioner was properly in the custody of the sheriff.

APPLICATION of Frederick Overfield for writ of *habeas corpus* to secure his release from the custody of the



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Argument for Respondent

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sheriff of Washoe County and from that of an agent of the State of Utah. **Petitioner discharged.**

*M. B. Moore*, for Petitioner:

The governor of one state has no authority to issue a warrant directing the deportation of a person except upon presentation of a state of facts constituting an offense under the laws of the demanding state.

Three things are necessary to constitute and complete the offense charged against the petitioner. (1) The felony must have been committed. (Wharton's Crim. Law, 10th ed. vol. 1, sec. 242; *Reynolds v. People*, 83 Ill. 479; *Welsh v. State*, 3 Tex. App. 413.) (2) Defendant must know that the felon is guilty. (Wharton's Crim. Law, *supra*.) (3) The felon must be, to some extent, sheltered from pursuit by the defendant. (*Loyd v. State*, 42 Ga. 221; *Wren v. Commonwealth*, 26 Gratt. 952; 12 Cyc. 192.)

A person cannot be prosecuted for an act of omission. (*Wren v. Commonwealth*, *supra*.) Where a statute makes it a crime to knowingly harbor a criminal, there must be knowledge of the commission of the offense and an intent to shield from the law. (*State v. Davis*, 14 R. I. 281.) Receiving stolen property, knowing it to be stolen, does not, in the absence of statute, constitute the receiver an accessory to the crime of larceny. (4 Black. Comm. 38; *Loyd v. State*, *supra*; *Street v. State*, 39 Tex. App. 134, 45 S.W. 577.)

*Edward F. Lunsford*, District Attorney, for Respondent:

Where a person voluntarily submits himself to arrest for the purpose of invoking the writ of *habeas corpus*, the court will not hear the proceedings. (21 Cyc. 290; 25 Cent. Dig., sec. 12; *In Re Gow*, 139 Cal. 242; *In Re Bailey*, 11 Pac. 672.)

Petitioner was an accessory after the fact, as described in the complaint upon which the requisition is based. (12 Cyc. 192.) The technical sufficiency of the indictment or information in the demanding state is not material. (21 Cyc. 328; *In Re Van Sciever*, 47 Am. St. Rep. 730; *Pearce v. Texas*, 155 U. S. 311.)

By the Court, MCCARRAN, J.:

This is an original proceeding in *habeas corpus*, in which the petitioner, Frederick Overfield, seeks to secure his release by order of this court from the custody of the sheriff of Washoe County, and also from the custody of one Victor Christopherson, the duly authorized agent of the State of Utah.

It appears from the petition that while petitioner was on his way to San Francisco he stopped over in the city of Reno to visit friends, and was there arrested by the sheriff of Washoe County, and has since been arrested and detained by said officer as a fugitive from justice. There are before us the requisition papers issued by the governor of the State of Utah, as well as the executive warrant issued by his excellency the governor of Nevada.

1. It has long since been established as a rule of this court that on matters of this kind the court would go behind the executive warrant and inquire into the sufficiency of the papers constituting the requisition issued out of the demanding state.

2. Petitioner in this case attacks the complaint on which and by reason of which he is sought to be returned to the State of Utah. The instrument, in substance, is as follows:

"On this 23d day of October, A. D. 1915, before me, L. R. Martineau, Jr., justice of the peace within and for Salt Lake City precinct, Salt Lake County, State of Utah, personally appeared Elmer L. Blake, who, on being duly sworn by me, on his oath did say that Frederick Overfield, on the 15th, 16th, and 17th days of October, A. D. 1915, at the County of Salt Lake, State of Utah, did commit the crime of being an accessory to the crime of obtaining property by false pretenses, as follows, to wit: That upon the 9th day of October, 1915, one Mark L. Kilbourne, at the County of Salt Lake, State of Utah, wilfully, unlawfully, knowingly, designedly, and with intent to cheat and defraud the International Consolidated Oil Company of Wyoming, a corporation, of its personal property herein-after described, did falsely and fraudulently pretend and represent to Elmer L. Blake, who was then and there the

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fiscal agent of said corporation, that he, the said Mark L. Kilbourne, had secured as a purchaser of bonds of the International Consolidated Oil Company of Wyoming, of the value of \$2,000, one Mr. Arlison, of the Judge Building, Salt Lake City and County, State of Utah; and the said Elmer L. Blake, then and there believing the false pretense and representation so made as aforesaid by the said Mark L. Kilbourne to be true, and then and there being deceived thereby, was then and there induced, as said fiscal agent of the said International Consolidated Oil Company of Wyoming, to part with and deliver to the said Mark L. Kilbourne, and he did then and there part with and deliver to the said Mark L. Kilbourne bonds of the International Consolidated Oil Company of Wyoming of the value of \$2,000, lawful money of the United States of America, the personal property of the said International Consolidated Oil Company of Wyoming; and the said Mark L. Kilbourne did then and there wilfully, unlawfully, knowingly, and designedly receive and obtain the said bonds of the said International Consolidated Oil Company of Wyoming from the said Elmer L. Blake by means of the false pretense and representation so made as aforesaid, and with intent then and there to cheat and defraud the said International Consolidated Oil Company of Wyoming of the said bonds, whereas, in truth and in fact, the said Mark L. Kilbourne had not, and he well knew that he had not, at the time and place aforesaid, secured as a purchaser for said bonds as aforesaid one Mr. Arlison, of the Judge Building, Salt Lake County, State of Utah; and the said Elmer L. Blake, as fiscal agent of the International Consolidated Oil Company of Wyoming, would not, as aforesaid, have parted with the said property, except upon the representation so made to him as aforesaid by the said Mark L. Kilbourne, and that afterwards, on the 15th, 16th, and 17th days of October, 1915, at the County of Salt Lake and State of Utah, as aforesaid, the said defendant, Frederick Overfield, well knowing the said Mark L. Kilbourne to have done and committed the said crime of obtaining property under false pretenses

in the manner and form aforesaid, and the said Frederick Overfield then and there having in his possession said bonds of the International Consolidated Oil Company of Wyoming of the value of \$2,000, did then and there wilfully, unlawfully, and feloniously protect the said Mark L. Kilbourne in the manner as follows: That the said Frederick Overfield, upon the said 15th, 16th, and 17th days of October, 1915, at the place aforesaid, did persuade and induce the aforesaid Elmer L. Blake to agree to delay the institution of criminal proceedings against the aforesaid Mark L. Kilbourne until 9 o'clock a. m. on the 18th day of October, A. D. 1915; and the said Elmer L. Blake, actuated by said persuasions, inducements, and agreement, did delay the institution of criminal proceedings against the aforesaid Mark L. Kilbourne until 9 o'clock a. m. on the 18th day of October, 1915; and, by virtue of said delay so caused as aforesaid, the aforesaid Mark L. Kilbourne did, on one of the days aforesaid, to wit, the 15th, 16th, and 17th days of October, 1915, depart from the State of Utah, and the said Frederick Overfield well knew that, by virtue of said delay so caused as aforesaid, the aforesaid Mark L. Kilbourne did depart from the State of Utah; and the said Frederick Overfield did, by virtue of said delay so caused as aforesaid, himself, upon the 17th day of October, 1915, depart from the State of Utah and take with him in his possession the aforesaid bonds of the International Consolidated Oil Company of Wyoming of the value of \$2,000."

By this complaint the authorities of the State of Utah seek to charge the petitioner here as being an accessory after the fact to the crime of obtaining property by false pretenses.

The Penal Code of the State of Utah (section 4075) is as follows:

"All persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor and protect the person charged therewith or convicted thereof, are accessories."

It is the contention of counsel for respondent herein

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that the acts set forth in the complaint as having been done by petitioner, to wit, the act of persuading and inducing Elmer L. Blake to delay the institution of criminal proceedings against Mark L. Kilbourne, the principal in the commission of the crime of obtaining property by false pretenses, made the petitioner an accessory after the fact.

In the statute of Utah as above set forth it will be observed that there are two elements, the wilful violation of either of which will make the violator an accessory after the fact. The one is the act of concealing from a magistrate knowledge that a felony has been committed. The other is harboring and protecting the person charged therewith or convicted thereof. It will be noted that the words "harbor and protect" are used in the conjunctive, and not in the disjunctive. It will be further noted that it must be a person charged with the commission of a felony.

The allegations of the complaint, if taken for the purposes of this proceeding to be true, and the words thereof are given their full legal force and significance, set forth acts and utterances on the part of the petitioner having the significance of persuasion and tending to induce a prosecuting witness from preferring charges against one known to have committed a felony. Assuming all of the allegations of the complaint in this respect to be true, does the complaint, in the light of the statute of Utah, actually charge any offense known to the laws of that state?

An examination of the authorities, both at common law and under the codes of the several states, discloses an almost universal holding that, in order to make one an accessory after the fact to a felony, the party charged must have performed some act to assist the principal felon personally.

In an early English case this principle was asserted, and it was held that writing letters to intimidate witnesses and prevent them from coming forward to give evidence was not a harboring and assisting of a felon. (*Regina*

v. *Chapple*, 9 Carr & Payne R. 355, 38 Eng. Com. Law Rep. 212.)

In Clark on Criminal Law it is asserted that merely suffering a felon to escape by taking no steps to detain him or to notify the authorities does not make one an accessory. "It is essential," the author says, "that the assistance shall be rendered to the felon personally." (Clark's Criminal Law, 2d ed. p. 114.)

In 1 Bishop's New Criminal Law, p. 422, sec. 695, subd. 2, the author asserts:

"He is an accessory who, with the requisite knowledge and intent, furnishes the principal felon 'with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him. So likewise to convey instruments to a felon to enable him to break jail, or to bribe the jailer to let him escape, makes a man an accessory to the felony.' But keeping a witness, by persuasion or intimidation, from appearing against a felon on his trial, does not render one the felon's accessory, though it is punishable as misdemeanor."

These texts are referred to approvingly by the Court of Criminal Appeals of Texas in the case of *Schackey v. State*, 41 Tex. Cr. R. 255, 53 S. W. 877. In the latter case it is held that the relation of accessory is a personal one to the offender to whom the aid is given, and is only found in the fact that assistance is rendered to the particular offense.

In the case of *Wren v. Commonwealth*, 26 Grat. (Va.) 952, the court said:

"But merely suffering the principal to escape will not make the party accessory after the fact; for it amounts, at most, but to a mere omission. \* \* \* Or, if he agree for money not to prosecute the felon, or if, knowing of a felony, fails to make it known to the proper authorities, none of these acts would be sufficient to make the party an accessory after the fact."

The case of *Wren v. Commonwealth*, *supra*, was referred to approvingly in the case of *State v. Doty*, by the Supreme

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Court of Kansas; and that tribunal, in the latter case, held that the mere fact that a person induced or persuaded another to tell a falsehood with reference to the actual perpetrator of a felony would not make the party so advising an accessory to the crime. (*State v. Doty*, 57 Kan. 835, 48 Pac. 145; *Chenault v. State*, 46 Tex. Cr. R. 351, 81 S. W. 971; *State v. Jett*, 69 Kan. 788, 77 Pac. 546; *Loyd v. State*, 42 Ga. 221.)

The Supreme Court of California, in passing upon the statute of that state identical to the one under consideration here, wherein an accessory after the fact is defined, said:

"The aforesaid section is not as plain and explicit as it might be by any means. At the same time the word 'conceal,' as here used, means more than a simple withholding of knowledge possessed by a party that a felony has been committed. This concealment necessarily includes the element of some affirmative act upon the part of the person tending to or looking toward the concealment of the commission of the felony. Mere silence after knowledge of its commission is not sufficient to constitute the party an accessory." (*People v. Garnett*, 129 Cal. 365, 61 Pac. 1114.)

See, also, *Ex Parte Goldman*, 7 Cal. Unrep. Cas. 254, 88 Pac. 819.

This rule, which we deem applicable to the matter at bar, has been approved by the leading cases upon this subject. (1 Ruling Case Law, pp. 148, 149.)

The act of a person having knowledge of facts concerning the commission of an offense in falsifying concerning his knowledge will ordinarily not render him an accessory after the fact. (Ruling Case Law, *supra*; *Levering v. Commonwealth*, 132 Ky. 666, 117 S. W. 253, 136 Am. St. Rep. 192, 19 Ann. Cas. 145, and note.)

As asserted by the Supreme Court of California in the case of *State v. Garnett*, *supra*, so in this case it appears to us necessary that the words "harbor and protect" imply more than mere withholding of knowledge as to the whereabouts of the party charged, and must necessarily

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contemplate the element of some affirmative act or acts of concealment or assistance rendered to the principal personally. Mere words of inducement or persuasion intended to cause a third person to delay the filing of a criminal charge are not enough to bring the party so doing within the scope of the statute.

3. Nor would the allegations in the complaint that petitioner had on his person the stolen property be sufficient to charge him with being an accessory after the fact of the crime of obtaining property by false pretenses. (1 Hale, P. C. 620; *Loyd v. State*, *supra*; *Street v. State*, 39 Tex. Cr. R. 134, 45 S. W. 577; 12 Cyc. 193; 1 Ruling Case Law, 149.)

4. As to the other matter raised by respondent wherein it is asserted that petitioner herein was not properly in custody at the time of the issuance of this writ, it is our judgment that, in view of the fact that the executive warrant had been previously issued by the governor of this state and was in the hands of authorized officers, the petitioner, in order to protect himself from being summarily removed from the state without opportunity to appeal to the courts for a review of the matters of law pertaining to his extradition, was warranted in delivering himself to the sheriff of Washoe County.

The authorized agent of the State of Utah, being interrogated, testified under oath that it was his intention to remove this applicant from the State of Nevada before he could have access to the courts. This attitude on the part of the agent of the State of Utah, being known to petitioner, was sufficient, in our judgment, to warrant him in taking every legal step which the law afforded for the enforcement of his legal rights. The attitude of the agent of the State of Utah in this respect is neither called for as a duty nor contemplated in the spirit of the law.

The complaint on which the executive warrant of the governor of Nevada issued failing, as it does, to state facts sufficient to constitute a public offense against the



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Coleman, J., concurring

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laws of Utah, petitioner should be released from custody and restored to his liberty.

It is so ordered.

NORCROSS, C. J.: I concur.

COLEMAN, J., concurring:

I concur in the order of discharge upon the ground that the facts stated in the complaint, set out in the opinion of the court, do not constitute a crime under the laws of Utah. I think the true test of what constitutes an accessory after the facts is laid down by the Supreme Court of Georgia in *Loyd et al. v. State*, 42 Ga. at p. 225, where it is said:

"\* \* \* We lay down the true test to be to consider whether what he did was done by way of personal help to his principal, with a view to enable the principal to elude punishment; and it is unimportant as to what assistance was rendered, provided it was done with a view to aid the principal to elude or escape punishment."

If the information set out in the petition had alleged that petitioner persuaded and induced Blake to delay the institution of criminal proceedings for the purpose and with the view and intent of affording Kilbourne an opportunity to depart from the state to avoid criminal prosecution, it might be that a crime would have been charged under the laws of the demanding state.

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## Points decided

[No. 2171]

## STATE OF NEVADA, RESPONDENT, v. WILLIAM PAPPAS, APPELLANT.

[152 Pac. 571]

## 1. HOMICIDE—ASSAULT WITH INTENT TO KILL—INTENT.

In a prosecution for assault with intent to kill, the specific intent being an element of the offense, no presumption of law can arise which will decide that question; hence a charge that, if accused assaulted another with a deadly weapon in a manner calculated to produce death, the law presumes such was his intention is erroneous.

## 2. CRIMINAL LAW—EVIDENCE—RES GESTÆ.

Where the prosecuting witness, when first asked who stabbed her, gave an equivocal answer, and stated that others ought to know the man, her next charge that accused was guilty, made forty-five minutes after the occurrence, when her wounds had been dressed and she was under no particular excitement, is not admissible as part of the *res gestæ*, there having been sufficient time to fabricate.

APPEAL from Fifth Judicial District Court, Nye County;  
*Mark R. Averill*, Judge.

William Pappas was convicted of assault with intent to kill. From the judgment and an order denying new trial, he appeals. **Reversed and remanded.**

*H. H. Atkinson*, for Appellant:

Testimony as to statements not a part of the *res gestæ* is generally regarded as hearsay, and is carefully excluded except in rare cases. (*Stairn v. Nelson*, 65 Kan. 419, 70 Pac. 355.)

Statements of the complaining witness, made after the alleged assault, were no part of the *res gestæ*; to be such, they must be an essential part of or spring spontaneously from the transaction itself. (*State v. Daugherty*, 17 Nev. 376, 30 Pac. 1074.)

*Geo. B. Thatcher*, Attorney-General, for Respondent:

The testimony of the prosecuting witness, as testified to by the witness Evans, is part of the *res gestæ*, and the admission of such testimony is within the discretion of the trial judge. (*State v. Ah Loi*, 5 Nev. 100; *State v.*

*Ferguson*, 9 Nev. 119; *Wigmore on Evidence*, sec. 1745; *Coffin v. Bradbury*, 3 Idaho, 786; *McPike v. Commonwealth*, 3 Cush. 184; *People v. Simpson*, 48 Mich. 479; *Kirby v. Commonwealth*, 77 Va. 688; *State v. Smith*, 26 Wash. 357.)

By the Court, COLEMAN, J.:

1. The defendant was charged with the crime of assault with intent to kill. Upon the trial the jury returned a verdict of guilty, and from an order denying a motion for a new trial and the judgment defendant appeals.

Error is assigned to the giving by the court of instruction No. 2 which reads:

"The law holds the defendant accountable for the natural and probable consequences of his acts, when unlawful, regardless of the question of whether he accomplished his purpose or not; and, if you believe from the evidence, beyond a reasonable doubt, that the defendant did assault Lillian Frazier with a dangerous weapon in such a manner as was calculated to produce the death of Lillian Frazier, the law presumes that such was the defendant's intention, and throws upon him the burden of showing facts in mitigation, justification, or excuse."

The portion of the instruction to which the objection goes is:

"The law presumes that such was defendant's intention and throws upon him the burden of showing facts in mitigation, justification, or excuse."

In the case of *People v. Landman*, 103 Cal. 577, 37 Pac. 518, a similar instruction was under consideration, and the court said:

"When a specific intent is an element of the offense no presumption of law can ever arise that will decide this question of intent; and therein is found the vice of the present instruction."

"We believe the law is correctly enunciated in the foregoing extract. Other authorities supporting this view are: *Roberts v. People*, 19 Mich. 401; *Patterson v.*

*State*, 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152; Lawson Pres. Ev., p. 271; *People v. Mize*, 80 Cal. 42, 22 Pac. 80. See, also, 12 Cyc., pp. 152, 153, 154.

Some authorities hold that while it is error to instruct the jury that the "law presumes" a defendant intended the natural consequences of his act, they hold that it is not error to instruct that the jury may presume that a defendant intended to accomplish the natural consequences of his act. But as this question is not before us, we express no opinion concerning it.

It is also contended that the trial court erred in giving the following instruction:

"If a witness examined before you has wilfully sworn falsely in a material manner, you may disregard the entire evidence of such a witness, except in so far as it is corroborated by other competent evidence."

In the very recent case of *Zelavin v. Tonopah Belmont Development Co.*, 39 Nev. 1, 149 Pac. 188, we commended an instruction which is substantially the same as the one complained of here, the only material difference being that in the one in that case the word "credible" was used instead of "competent." As will be readily seen, there is a marked difference between the two words. But appellant objects to the instruction quoted in the *Zelavin* case. That instruction is not only one which has found favor in this court, but in other courts (38 Cyc. 1733), and, we believe, with the bench and bar of the state generally. The only court which has emphatically repudiated such an instruction is that of Oklahoma, as appears from the *Williams* case, cited by us in the *Zelavin* case, *supra*. In view of the fact that this case must be reversed for other reasons, and the further fact that the instruction given will not, in all probability, be given upon another trial of the case, it is not necessary that we determine whether or not error was committed in the instruction given by the court below.

2. It is insisted on the part of the appellant that the trial court erred in admitting in evidence as a part of the *res gestæ* the testimony as to the statement made by

the prosecuting witness, as testified to by the witness Evans. The prosecuting witness, about forty-five minutes after she had been stabbed, in response to inquiries of witness Evans, stated that it was defendant (giving his name) who had assaulted her, and she described him. We believe that the correct rule applicable to this question was declared by this court in *State v. Ah Loi*, 5 Nev. 99, where it is said:

"The position taken by counsel for the prisoner upon the first assignment is clearly not maintainable upon the authorities. The statement made by the prosecuting witness that she had been robbed—a very few minutes after the crime was committed, and whilst she was still weeping because of the loss of the money taken from her—was undoubtedly admissible as a part of the *res gestæ*, and confirmatory of the evidence given by her. In the case of *Commonwealth v. McPike*, 3 Cush. 181, 50 Am. Dec. 727, the Supreme Court of Massachusetts ruled that the statement made by a person who had received a mortal wound a few minutes before, as to the cause and manner of the injury, was admissible as being in the nature of the *res gestæ*; Dewey, J., saying, in delivering the opinion: 'That the period of time at which these acts and statements took place was so recent after the receiving of the injury as to justify the admission of the evidence as a part of the *res gestæ*. In the admission of testimony of this character much must be left to the sound discretion of the presiding judge. So where a man was killed in consequence of having been run over by a cabriolet, it was held, on an indictment against the driver for manslaughter, that what the man said immediately after receiving the injury was admissible in evidence. (6 C. & P. 325.) To make declarations a part of the *res gestæ*, it is true, it is said they must be contemporaneous with the main fact; but in order to be contemporaneous, they are not required to be precisely concurrent in point of time. If the declarations spring out of the transaction—if they elucidate it, if they are voluntary and spontaneous, and if they are

made at a time so near to it as reasonably to preclude the idea of deliberate design—they may be regarded as contemporaneous. (6 C. & P. 325. See, also, *Mitchum v. State*, 11 Ga. 615; Corwin & Hill's Notes to Phillips's Evidence, note 432.) Undoubtedly such statements should be received with great caution, and only when they are made so recently after the injury is received, and under such circumstances as to place it beyond all doubt that they are not made from design or for the purpose of manufacturing evidence. Hence, from the very nature of the thing, very much must be left to the discretion of the presiding judge. Here the statement was made immediately after the robbery, and under circumstances which made it eminently proper to admit it. Supported as this ruling by the court below is by the general current of decisions, it must be sustained.' "

The case of *State v. Daugherty*, 17 Nev. 376, 30 Pac. 1074, was reversed because of the admission by the trial court of a statement made by the person assaulted seven or eight minutes after the assault was made; the court, after quoting from several authorities, saying:

"The evidence was the narration of a past occurrence, and was incompetent."

Chamberlayne, in his *Modern Law of Evidence*, at section 3006, lays down the rule for determining whether a statement should be rejected, as follows:

"Whether the circumstances under which a declaration was made are such as to make it reasonably probable that it was spontaneous presents a preliminary question for the determination of the trial judge. The burden is upon the proponent to show the essential facts. Should the judge be of opinion that an opportunity for deliberation and reflection has been afforded to the speaker, it will be assumed to have been utilized, the declaration being rejected."

Professor Jones lays down the rule to be:

"\* \* \* Hence, if there is reason to suppose that

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the declarations are not the natural and spontaneous utterance of the declarant, but that they are premeditated or designed for a purpose, they are inadmissible." (2 Jones on Evidence, sec. 351.)

"\* \* \* The utterance, it is commonly said, must be 'spontaneous,' 'natural,' 'impulsive,' 'instinctive,' generated by an excited feeling which extends without let or breakdown from the moment of the event they illustrate." (3 Wigmore on Evidence, sec. 1749.)

The same learned author, at paragraph (b) of section 1750, says:

"The utterance must have been before there has been time to contrive and misrepresent, *i. e.*, while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. This limitation is in practice the subject of most of the rulings."

The witness James Welch testified that he was one of the first persons to reach the prosecuting witness after she had been stabbed, and that:

"There was somebody else there; was asking her at the time I was. One of the girls said, 'Who was it?' and she [prosecuting witness] says, 'Why, you know that fellow,' and she described him, about the suit and shoes, and scar over one of his eyes, or up on his forehead there was a scar."

This is all the evidence in the record as to any description of the assailant alleged to have been given by the prosecuting witness until the witness Evans appeared, about half an hour later. In reply to the questions of Welch and "one of the girls," she did not undertake to give the name of her assailant, nor does it appear whether or not her other description of him corresponded to that which she later gave to Evans. On direct examination the prosecuting witness testified:

"Q. Now, did you—do you know the defendant Pappas?  
A. Yes, sir.

"Q. How long had you known him? A. I met him the night before he stabbed me, first.

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"Q. What night was that? A. Thursday night was the first night I ever met him."

On cross-examination, the prosecuting witness testified:

"Q. The first time that you saw Pappas was in the Casino that evening, Thursday evening [night before cutting], and you brushed by him, did you? A. Yes, sir. \* \* \*

"Q. Never seen him before? A. No doubt he had seen me, I don't know; but I never knew him."

To the writer there is about this entire case something of a mystery. It appears that the defendant and the prosecuting witness never spoke to each other before Thursday night, and he is charged with having assaulted her about 3 o'clock on the following Saturday morning, in her crib, without a quarrel or trouble of any kind between them. From the testimony of the prosecuting witness, robbery could not have been the assailant's motive. On the other hand, what could have availed the prosecuting witness to falsely accuse the defendant? We can conceive of no advantage which could have accrued to her in falsely accusing the defendant. It is urged that the defendant was accused for the purpose of shielding another. Such may have been the case.

Another particular thing is her testimony to the effect that she had not known the defendant more than about thirty-four hours before she was stabbed, yet when asked by Welch and one of the girls, "Who did the cutting?" she failed to give defendant's name (though giving it later to Evans), and stated, "Why, you know that fellow." If the prosecuting witness had known her assailant for only about thirty-four hours, and the only times she had seen him being when she brushed past him in the Casino dance-hall, and in the privacy of her crib, in what position was she to speak so confidently that others knew him? It looks as though she was at that time endeavoring to conceal the identity of her assailant. If such was the case, it is clear that her subsequent statement to Evans should not have been admitted.

We have adverted to the testimony at this juncture because it seems to emphasize the force of the rule laid



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McCarran, J., concurring

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down by the authorities. Did the prosecuting witness have an opportunity for deliberation and reflection? She was asked flatly by Welch and one of the girls who her assailant was, and, so far as it appears from the record, she gave them no clue to his identity. She must have realized that she would be urged by the officers to disclose the identity of her assailant; she could reasonably anticipate that an officer would seek such information. She certainly not only had an opportunity for deliberation and reflection, but from the questions of Welch and the girl it was forcibly brought to her attention that she would be urged to speak. The statement to Evans having been made about forty-five minutes after the cutting, and after the conversation with Welch and one of the girls, and after the doctor had sewed up her wounds, when, so far as it appears, she was laboring under no excitement, and when she was in a frame of mind to speak deliberately, we feel satisfied that it cannot be said to be a part of the *res gestæ*, and consequently the objection to it should have been sustained.

As we view the evidence in this case, it wholly fails to establish an alibi. One of the witnesses called for that purpose testified that he left the defendant in his room about 10 o'clock the night of the cutting, and did not see him again that night, and the other one testified to an alleged occurrence at the Casino dance-hall at a later hour, but that he did not see him after 11:30 o'clock, while the undisputed evidence shows that the cutting took place about 3 o'clock in the morning. The testimony of the alibi witnesses could have been true, and still the defendant might have been at the crib of the prosecuting witness at the time of the cutting.

For the errors pointed out, the judgment is reversed, and a new trial ordered.

NORCROSS, C. J.: I concur.

MCCARRAN, J., concurring:

I concur in the order, and so much of the opinion as deals with instruction No. 2, given by the trial court. The impropriety of this instruction has long since been

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Points decided

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established by the decision of this court. (*State v. Newton*, 4 Nev. 410; *State v. Rodriguez*, 31 Nev. 342, 102 Pac. 863.) The giving of this instruction was sufficient error to reverse this case.

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[No. 2180]

A. P. LAFFRANCHINI, APPELLANT, v. EMILY CLARK (FORMERLY EMILY JAMES), AS GUARDIAN OF THE PERSON AND ESTATE OF MARY BERRYMAN JAMES (A MINOR), AND MARY BERRYMAN JAMES (A MINOR), RESPONDENTS.

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[153 Pac. 250]

1. GUARDIAN AND WARD—CONVEYANCE BY GUARDIAN—AUTHORITY.

Where a guardian of an infant gave a mortgage upon the common property of the infant, and the guardian, in order to pay off a mortgage about to be foreclosed, such mortgage was not valid; there being at the time no statute conferring on the court the power to allow the guardian to execute such mortgage.

2. SUBROGATION—PERSONS ENTITLED—MORTGAGEES—VOLUNTEER AND "INTERMEDDLER."

Where a guardian executed a mortgage upon land owned by herself and her minor ward to obtain money to prevent foreclosure under another mortgage running to a third party, the mortgagee was subrogated to the rights of the original mortgagee, where his mortgage was invalid, and the fact that he had no previous interest in the property did not make him a volunteer or intermeddler, a volunteer and intermeddler being a person who thrusts himself into a situation on his own initiative, and not one who becomes a party to a transaction upon the urgent petition of a person who is vitally interested therein, and whose rights would otherwise be sacrificed.

3. LIMITATION OF ACTIONS—SUIT TO FORECLOSE MORTGAGE.

A mortgage being a mere incident to the debt secured, an action to foreclose the mortgage is barred at the expiration of six years from the maturity of the note secured under Comp. Laws. 3718, providing that actions upon contracts and obligations founded upon instruments in writing must be brought within six years.

## Argument for Appellant

## 4. LIMITATION OF ACTIONS—PART PAYMENT—RIGHTS OF SUBROGATION.

Though the mortgage given by a guardian for herself and on behalf of her minor ward was invalid for the reason that the order of the probate court, directing the execution of the mortgage, was without statutory authority, the proceeds of the mortgage having been applied to the satisfaction of a valid existing mortgage, a payment of interest on the invalid mortgage will be applied on the former mortgage for the purpose of tolling the statute of limitations in favor of the right of the second mortgagee to enforce the prior mortgage by way of subrogation.

APPEAL from Second Judicial District Court, Washoe County; *R. C. Stoddard*, Judge.

Action by A. P. Laffranchini against Emily Clark, as guardian of Mary Berryman James, and another. Judgment for defendants, and plaintiff appeals. **Reversed and remanded.**

*H. W. Huskey*, for Appellant:

The guardian had the right, "for the best interest of the ward," to mortgage the property. The powers indirectly granted by the statute were necessary in the correct management of the ward's estate, included the power to mortgage the ward's property to preserve it, and the amendment of 1911 resulted only in expressly stating the inherent powers of the court resulting from the sections of the statutes as they stood in 1908. (*Northwestern G. L. Co. v. Smith*, 15 Mont. 101, 48 Am. St. 662; *Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82; *Smith v. Sackett*, 10 Gillman's Rep. 534; *Schmitt v. Jensen*, 140 Pac. 518.)

If it is not effective as a mortgage, the claim will be enforceable as an equitable lien. (*Klaustermeyer v. Cleveland Trust Co.*, 105 N. E. 278; 1 Jones on Mortgages, 6th ed. sec. 163; *Howe v. Courtney*, 107 N.W. 206; *Richardson & May v. Hamlet*, 33 Ark. 237; *Remington v. Higgins*, 54 Cal. 620; *Peers v. McLaughlin*, 26 Pac. 119.)

Where each owned an undivided one-half interest in a single city lot, and an existing encumbrance endangered the whole property, the court had the power to authorize the guardian to mortgage the ward's interest jointly with

## Argument for Respondents

her own to secure money to save the property. (38 Cyc. 40; 23 Cyc. 494.)

Where money is advanced upon request of a guardian to preserve a ward's property by paying off an existing encumbrance, with the understanding that such loan shall be secured by a first mortgage, and the mortgage given is invalid, the mortgagee will be subrogated to the rights of the former mortgagee. (37 Cyc. 363, 471; *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187; *Gans v. Thieme*, 93 N. Y. 232.)

The right to subrogation is not barred by the statute of limitations. (*Coyle v. Wilkins*, 57 Ala. 108; *Whittington v. Flint*, 43 Ark. 504; *Ringo v. Woodruff*, 43 Ark. 649.)

If the rights of third parties have not intervened, a delay short of the statutory period of limitations will not bar a right to be subrogated. (*Hughes v. Thomas*, 111 N. W. 474.)

A mistake of law is an erroneous conclusion as to the legal effect of known facts; and such a mistake, unconnected with a mistake of fact, and where there are no indications of fraud, imposition, or undue advantage in the transaction, will not be considered by a court of equity. (15 Am. & Eng. Ency. Law, p. 634; *Guy v. Du Uprey*, 16 Cal. 196; *Brown v. Rouse*, 125 Cal. 645, 58 Pac. 267.)

*James B. Jones*, for Respondents:

The guardian has no power to mortgage his ward's real estate, except by order of court, based upon a statute empowering the court to make such order. (21 Cyc. 84.)

At the time of the giving of the mortgage there was no statute authorizing the court to order its execution. The later amendment authorizes a mortgage only when it appears for the best interest of the ward. The amendment proves that no authority theretofore existed. (Stats. 1911, p. 71; Rev. Laws, 6165.)

The power generally to sell or dispose of the real and personal property of minors, whether conferred by a testator by will, or upon a court by public statute, confers

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no power to mortgage. (*Trutch v. Bunnell*, 11 Or. 58, 50 Am. Rep. 457.)

Equity will not give a remedy in direct contravention of a positive law. (Bispham's Pr. of Eq., p. 57.) If there can be no mortgage in law, there can be none in equity. (*Capen v. Ganison*, 5 L. R. A. 838.) Equity follows the law in the sense that it is bound generally, at least, by positive restrictions and rules of policy; and if an instrument is void at law for want of power to execute it, or is forbidden by statute, equity will not enforce it. (16 Cyc. 137.)

By the Court, COLEMAN, J.:

This is an action to foreclose a mortgage. From a judgment for costs in favor of the defendants, following an order sustaining a demurrer to plaintiff's complaint, an appeal is taken to this court.

The complaint alleges that in May, 1907, William James executed his certain promissory note to one John Schmitt in the sum of \$4,000, bearing interest at 8 per cent per annum, payable May 27, 1908, to secure which he executed to Schmitt a mortgage upon lot 4, block C, of Reno; that on January 10, 1908, said James conveyed, subject to said mortgage, the lot mentioned to his wife, who is now Emily Clark, one of the defendants, and his daughter, Mary Berryman James, each receiving an undivided one-half interest; that said William James died January 15, 1908; that on April 14, 1908, defendant Emily James, now Emily Clark, was appointed guardian of her codefendant, Mary Berryman James, thereafter qualified as such guardian, and ever since has been, and now is, such guardian; that when the said note fell due on May 27, 1908, the said John Schmitt, the owner thereof, demanded payment, and threatened that, if payment was not forthwith made he would foreclose his said mortgage; that the interest of said minor was in great danger of being lost unless said note was paid; that the said Emily James (now Emily Clark), the guardian of Mary Berryman James, petitioned the district court of Washoe County for authority to

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borrow a sum not to exceed \$6,000 with which to pay off said indebtedness and satisfy some other outstanding liens against the property; and that, notice having been given of the hearing upon said petition, the court entered an order authorizing the said guardian to secure a new loan in a sum not to exceed \$6,000, to execute the joint note of herself individually and as guardian, and to secure the payment of the same by a like joint mortgage upon the property in question; that in pursuance of said order plaintiff loaned defendants the sum of \$5,000, and took their note, dated June 13, 1908, payable one year after date, with interest at 12 per cent per annum, and that a mortgage to secure the same was executed by said Emily James (now Emily Clark), individually and as guardian of Mary Berryman James, upon the property; that on June 14, 1911, all of the interest then due on said note was paid, and by mutual agreement the rate of interest was reduced to 8 per cent per annum.

It is the contention of appellant: (1) That the mortgage to appellant is a valid instrument; and (2) that, if not valid as a mortgage, appellant should be subrogated to the rights of John Schmitt under the mortgage held by him, and which was paid off by the money advanced by appellant.

1. As to the first contention, we are clearly of the opinion that it cannot be sustained. At the time the court ordered the guardian to borrow money and to secure the payment thereof on the part of the ward by giving a mortgage, there was no statute, as there is now (Stats. 1911, p. 71; Rev. Laws, 6165) authorizing the court to empower the guardian to execute a mortgage. The general rule covering this situation is stated by Cyc. as follows:

"The guardian has no power to mortgage his ward's real estate unless authorized by order of court in pursuance of a statute empowering the court to make such order." (21 Cyc. 84.)

See, also, 15 Am. & Eng. Ency. Law (2d ed.) 69; Woerner, Amer. Law of Guardianship, p. 177.

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Appellant cites *Northwestern G. L. Co. v. Smith*, 15 Mont. 101, 38 Pac. 224, 48 Am. St. Rep. 662, in support of the contention that the mortgage is valid. Suffice it to say that if we approved of the ruling in that case (as to which we express no opinion), the facts of this case are not the same as in that one; consequently it is no authority to support the contention here.

2. Should the appellant be subrogated to the rights of John Schmitt? By the demurrer it is admitted that the money advanced by appellant paid off the indebtedness of Schmitt. This money was advanced at the request of respondent Emily Clark, both in her individual and in her representative capacity. While the mortgage is void what is there to prevent the subrogation of appellant to the rights of John Schmitt, who was paid with appellant's money? It is urged on the part of respondents that appellant was a mere volunteer, a stranger and an intermeddler, and therefore that he should not be substituted. We concede that a volunteer and intermeddler has no rights. The question then is, Was appellant a volunteer, a stranger, and an intermeddler? It was said by the Supreme Court of Utah, in *George v. Butler*, 16 Utah, 111, 50 Pac. 1032, that:

"Tested alone by the earlier cases, Sutherland might be regarded as a volunteer, but latterly the doctrine of subrogation has been developed and expanded, and given a wider application to business matters. By analogy, it has been applied to transactions similar to the one under consideration, to one having no previous interest to protect, who pays off a mortgage, or advances money for its payment, at the instance of the mortgagor, and for his benefit, when no innocent person can be injured, believing he is getting security equal to that of the person whose debt he pays. We cannot hold Sutherland to be a mere volunteer or stranger, officiously intermeddling by paying the debts due the Pacific Investment Company. (*Emmert v. Thompson*, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566; 3 Pom. Eq. Jur., sec. 1212; *Cobb v. Dyer*, 69 Me. 494; *Bruse v. Nelson*, 35 Iowa, 157; *Whitesalle v.*

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*Loan Agency*, 27 S. W. 309; Harris, Subr. sec. 811.) Our conclusion is that the decree of the court below, subrogating the cross complainant to the lien of the Pacific Investment Company by virtue of the assignment and delivery of the lease as a pledge to secure the \$2,500 loaned on November 1, 1890, and directing it to be paid before the debt to plaintiff, was not erroneous. The decree of the court below is affirmed."

In the case of *Gans v. Thieme*, 93 N. Y. 232, the court uses the following language:

"It is no doubt true, however, as the learned counsel for the respondents argues, that a volunteer cannot acquire either an equitable lien or the right to subrogation, \* \* \* but no one who, at the request of another, advances his money to redeem, or even to pay off a security in which that other has an interest, or to the discharge of which he is bound, is not of that character, and, in the absence of an express agreement, one would be implied, if necessary, that it shall subsist for his use, and it will be so enforced. But the doctrine of substitution may be applied although there is no contract, express or implied. It is said to rest 'on the basis of mere equity and benevolence,' \* \* \* and is resorted to for the purpose of doing justice between parties. Here the defendants have no equity."

Mr. Pomeroy, in considering the question of subrogation, says:

"The doctrine is also justly extended, by analogy, to one who, having no previous interest and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party and for his benefit; such a person is in no sense a mere stranger and volunteer." (3 Pom. Eq. Jur., sec. 1212.)

"One who at the instance of the debtor advances money to be used by the debtor in the payment of a prior security, is not a stranger or intermeddler in his affairs." (*Union M. B. & T. Co. v. Peters*, 72 Miss. 1058, 18 South. 497, 30 L. R. A. 829, citing authorities.)

In *Zimmerman v. Haller*, 154 N. Y. Supp. 674, the court uses the following language:



"Subrogation is, in point of fact, simply a means by which equity works out justice between man and man. Judge Peckham says, in *Pease v. Egan*, 131 N. Y. 262, 30 N. E. 102, that 'it is a remedy which equity seizes upon in order to accomplish what is just and fair as between the parties'; and the courts incline rather to extend than to restrict the principle, and the doctrine has been steadily growing and expanding in importance."

Therefore, whatever may have been the old test of what constituted a volunteer, stranger, and intermeddler, we believe that the decided trend of modern authorities is to take a liberal view of the question; and, being guided by this modern view, we are of the opinion that a volunteer, a stranger, an intermeddler, is one who thrusts himself into a situation on his own initiative, and not one who becomes a party to a transaction upon the urgent petition of a person who is vitally interested, and whose rights would be sacrificed did he not respond to the importunate appeal. If this conception is in keeping with what we believe to be the modern and better view, it is clear that appellant was no stranger, volunteer, or intermeddler. If he was not, why should he suffer?

It was said in *Stevens v. King*, 84 Me. 293, 24 Atl. 851:

"Legal subrogation takes effect to its full extent for the benefit of one who, being himself a creditor, pays the claim of another who has a preference over him by reason of his liens and securities. (Bouv. Law Dic. Subrogation.) It applies to a great variety of cases, and is broad enough to include every instance in which one party pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter; not, however, in the interest of mere volunteers and intermeddlers; nor is it allowed so as to do injury to the rights of others. It ignores the form and looks to the substance. It construes payment to be purchase and purchase to be payment, as justice may demand. It substitutes one person for another, or property for property. Sheldon on Subrogation, sec. 247, lays down as deducible from the cases on the subject the following rule: 'And a party who has paid a debt at the request of a debtor,

and under circumstances which would operate a fraud upon him if the debtor were afterwards allowed to insist that the security for the debt was discharged by his payment, may also be subrogated to the security, as to that debtor.' "

Would not a fraud in fact be perpetrated upon appellant if he were not permitted to be subrogated to the Schmitt mortgage? The Schmitt mortgage was given by the father of the minor; she took the property subject to the debt. Would it not be an approval of the grossest injustice for a court of equity to permit this minor to have the property relieved of the burden attached to it, at the expense of one who aided her, as did appellant?

The reasons which have induced the courts to deny the right of a guardian to mortgage an infant's property do not exist here. The courts, in denying this privilege (when not allowed by statute), proceed upon the theory that mortgages, as a rule, eat up the estate. In this case the process of devouring was about to be set in motion when request was made to appellant to save the estate from an existing mortgage; one more effort, and the estate would have been "swallowed up." Appellant stepped into the breach; he stayed the pending and final gulp; he preserved the *status quo*, and at a time, too, when the entire country was at the tail end of a devastating financial cataclysm; in fact, he was a "good Samaritan." What shall he receive for his pains? Gratitude or ingratitude? justice or injustice? equity or inequity? The spirit of common decency, to say nothing of equity, prompts a court to hold that this man should not be turned away without relief. In our opinion, appellant should be subrogated to the rights of John Schmitt. And in this opinion we do not stand alone. Other courts have passed upon similar transactions.

"The right of subrogation, or of equitable assignment, is not founded upon contract alone, nor upon the absence of contract, but is founded upon the facts and circumstances of the particular case, and upon principles of natural justice; and generally, where it is equitable that

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a person furnishing money to pay a debt should be substituted for the creditor, or in place of the creditor, such person will be so substituted." (*Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 455, 57 Am. Rep. 187.)

See, also, 37 Cyc. 363, 364, 365; *Northwestern Mut. S. & L. Assn. v. White* (N. D.) 153 N.W. 975; *Hays v. Ward*, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; *Wall v. Mason*, 102 Mass. 313.

The case of *Crippen v. Chappel*, *supra*, is, in legal effect, identical to the one at bar. In that case money was advanced to pay off a prior mortgage upon the assurance that the administrator would obtain an order of court authorizing him to execute a mortgage to secure the money thus advanced. The order of court was obtained, the money advanced, and the mortgage executed pursuant to the order of court. The mortgage given by the administrator was void for the reason that the court had no authority to empower the giving of it. It was held in that case that the parties loaning the money, under those circumstances, to pay off the first mortgage, would be subrogated to the rights of the holder of the mortgage paid off. We believe the holding of the court was founded upon principles of equity and natural justice, and for the court not to have so held would have enabled the other parties to perpetrate a fraud upon the one who came to their rescue.

In the case of *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154, it appears that Virginia Wilson, after executing a mortgage upon certain real estate, died, leaving minor children. The mortgage was foreclosed. For the purpose of raising money to redeem from the foreclosure sale, an order of court was made, authorizing the execution of a mortgage upon the property. In proceedings to foreclose the last-mentioned mortgage, the court held the mortgage to be void, but ruled that the mortgagee should be subrogated to the rights of the mortgagee whose debt had been paid off with the money realized under the void mortgage. The court said:

"One who in good faith lends money which is actually

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used to pay debts of an estate, \* \* \* and in pursuance of said agreement takes a mortgage for his security, which proves invalid, will be subrogated to the benefit of the liens held by the creditors of said estate who were paid with his money"—citing authorities.

We think that the reasoning of the Supreme Court of Montana, in the case of *Northwestern G. L. Co. v. Smith*, *supra*, is in support of our position in this case. At page 462, 37 Cyc., it is said:

"Where an invalid or defective mortgage is given to secure an advance of money made for the express purpose of paying off a prior incumbrance, the mortgagee in the defective mortgage will be subrogated to the lien of the incumbrances so discharged, in the absence of intervening incumbrances."

See, also, *Northwestern Mut. S. & L. Assn. v. White* (N. D.) 153 N. W. 975.

In the case of *Heuser v. Sharman*, 89 Iowa, 355, 56 N. W. 525, 48 Am. St. Rep. 330, it is said:

"It has been held that the right of subrogation is not founded on contract, but is the creation of equity, and enforced solely for the protection of persons who, by paying the debts of others, should in good conscience be substituted in the place of the original creditor. But now it is held by many of the courts that where a third person pays the debt at the instance of the debtor, and upon an agreement or understanding with the debtor that he shall be entitled to the benefit of the security held by the creditor, equity will compel the debtor to do justly, and will substitute the person who discharges the debt to all the rights of the creditor whose claim the third person has discharged. (*Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187; *Insurance Co. v. Aspinwall*, 48 Mich. 238, 12 N. W. 214; *Levy v. Martin*, 48 Wis. 198, 4 N. W. 35; *Cobb v. Dyer*, 69 Me. 494; *McKenzie v. McKenzie*, 52 Vt. 271; *Emmert v. Thompson*, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566; *Baker v. Baker*, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776.) Without reviewing these authorities, it is sufficient to say that they fully sustain

the rule above announced. In some of them there does not appear to be even an express contract that the substitution shall be made, but the right was enforced because of a mere understanding or expectation of the transfer of the security; in others the contract was that the mortgage should be paid, and a new one substituted for it; and in others, where new mortgages were made which were held to be invalid, it was held that the person making the payment was entitled to be subrogated to all the rights of the original mortgagee. This principle commends itself to us as eminently just."

In the case of *Haverford L. & B. Assn. v. Fire Assn.*, 180 Pa. 522, 37 Atl. 179, 57 Am. St. Rep. 657, it is said:

"Thomas Dougherty, supposing that under the will of Frances Dougherty he was the owner of the entire premises, mortgaged them to the appellant for \$2,200, and the appellant, also supposing him to be the owner, loaned him the money, but at his request applied part of it to the payment of a prior mortgage to the Fire Association, one of defendants. It is now conceded that, by the true construction of the will of Frances Dougherty, Thomas was not the owner of the whole, but only of an undivided fifth as tenant in common with his four children. Under these circumstances it is entirely clear that Dougherty, having relieved the common estate of an incumbrance, was entitled to contribution from his cotenants, and might have enforced his claim by subrogation to the rights of the mortgagee under the discharged mortgage. \* \* \* In the present case the appellant was not a volunteer, but paid the first mortgage on the express direction of the debtor, and with the intention of both parties that the appellant should be secured by the land. 'A person who has lent money to a debtor for the purpose of discharging a debt may be subrogated by the debtor to the creditor's rights, and if the party who has agreed to advance the money for the purpose employs it himself in paying the debt and discharging the incumbrance on land given for its security, he is not to be regarded as a volunteer. He is not, after

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such an agreement with the debtor, a stranger in relation to the debt, but may, in equity, be entitled to the benefit of the security which he has satisfied with the expectation of receiving a new mortgage or lien upon the land for the money paid.' (Dix. Subr. 165.)"

See, also, *Lashua v. Myhre*, 117 Wis. 18, 93 N. W. 811; *Scott et al. v. Land Mort. I. & A. Co.*, 127 Ala. 161, 28 South. 709; *Whitewell v. Texas* (Tex. Civ. App.) 27 S. W. 309; *Baker v. Baker*, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776; *Sproal v. Larsen*, 138 Mich. 142, 101 N. W. 213; *Western Mort. & I. Co. v. Ganzer*, 63 Fed. 647, 11 C. C. A. 371; *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437; *Warford v. Hankins*, 150 Ind. 489, 50 N. E. 468; *Bank v. Brock*, 13 S. D. 409, 83 N. W. 436; *Reimler v. Pfingsten* (Md.) 28 Atl. 24; *Gore v. Brian* (N. J. Ch.) 35 Atl. 897; *Fievel v. Zuber*, 87 Tex. 275, 3 S. W. 273; *Mitchell v. Butt*, 45 Ga. 162; *Emmert v. Thompson*, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566; *Boevink v. Christiaanse*, 69 Neb. 256, 95 N. W. 652.

3, 4. But it is urged by the respondents that, even if appellant is subrogated to the rights of Schmitt, the right of foreclosure is barred by the statute of limitations. The note held by Schmitt fell due May 27, 1908. The debt is the principal thing, and the mortgage but a mere incident. (27 Cyc. 1286; *Local I. Co. v. Humes*, 151 Pac. 878.) By section 3718, Cutting's Comp. Laws (section 4967, Revised Laws of Nevada), actions upon contracts and obligations founded upon instruments in writing must be brought within six years. So that, if there were no payment or new promise, action on the Schmitt note would have been barred after May 27, 1914. The present suit was not commenced until after that date. But holding, as we do, that appellant should be subrogated to the rights of Schmitt, he stepped into the shoes of Schmitt, so to speak, as of the date of the payment of the Schmitt note, which was on or about June 12, 1908. While on June 14, 1911, there was paid to appellant in behalf of respondents the accrued interest on the mortgage executed pursuant to the order of the court, we think, in

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Points decided

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view of the circumstances, that that payment should be credited first to the payment of the accrued interest on the Schmitt note, at the rate of interest it was drawing, and that the excess, if any, should be credited upon the principal of that note. That being done, it will be seen that suit upon the Schmitt note is not barred by the statute, even as of this date. (*Bassett v. Mining Co.*, 15 Nev. 293; 25 Cyc. 1034, 1035.)

It is ordered that the judgment of the district court be reversed, and that the case be remanded for further proceedings in accordance with the views herein expressed.

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[No. 2201]

IN THE MATTER OF THE APPLICATION OF W. L. COUNTS  
FOR A WRIT OF HABEAS CORPUS.

[153 Pac. 93]

1. LICENSES—POWERS OF CITY COUNCIL—JITNEY BUSES.

Under Reno City Charter, art. 12, sec. 10, subd. 12, as amended by Stats. 1915, c. 184, giving the city council power to impose a license tax on and regulate hacks, hackney coaches, and "all other vehicles used for hire," the city council had authority to pass an ordinance licensing and regulating the operation of jitney busses.

2. STATUTES—AMENDMENT—AMENDMENT OF REPEALED ACT.

An amendment of a city charter was not invalid because the title of the act purported to amend an act theretofore repealed.

3. LICENSES—REASONABLENESS—AMOUNT.

A city ordinance licensing jitney busses and regulating the tax according to the seating capacity, was not invalid as failing to comply with the charter provision that all licenses should be graduated according to the amount of business done.

4. MUNICIPAL CORPORATIONS—POWERS—LICENSES—JITNEY BUSES.

Stats. 1913, c. 206, regulating automobiles or motor vehicles on public roads and streets, providing a license for the operation thereof, and in section 15 providing that the act shall in no wise affect any statute now existent nor that may hereafter be enacted providing for the licensing of automobiles for hire, does not interfere with the power of a city to license and regulate the use of jitney busses.

## Argument for Respondent

ORIGINAL PROCEEDING by W. L. Counts for writ of *habeas corpus*. **Writ denied.**

*Sweeney & Morehouse*, for Petitioner:

The right to declare an automobile, whether for pleasure or hire, a "jitney bus," is not specifically granted by the state law or the city charter. A city can exercise only such powers as are expressly granted, and such others as may be necessary to carry into execution the powers expressly granted. (*Collins v. Hatch*, 18 Ohio, 523, 51 Am. Dec. 465.)

There is no special grant of power to license automobiles, and no such ordinance or license can be made under the general welfare clause of the charter. (*People v. Bruce*, 63 Pac. 519.)

The act of 1903 has been absolutely repealed, and therefore the title of said act could not be repealed by the statute of 1915. (36 Cyc. 1085-1165; *Sandoval v. Board*, 86 Pac. 427; *State ex rel. Flack v. Rogers*, 10 Nev. 319; *State v. Lee*, 28 Nev. 380; 26 Am. & Eng. Ency. Law, 703.)

Where there is no special grant of power given to a municipal operation, it cannot, under the general welfare clause, pass an ordinance making that an offense against the city which is an offense against the state. (*State v. Welch*, 36 Conn. 215; *Mayor v. Hussey*, 21 Ga. 80; *Jenkins v. Mayor*, 35 Ga. 145; *Lockwood v. Muhlberg*, 124 Ga. 660; *Loeb v. City*, 82 Ind. 175; *State v. McCoy*, 116 N. C. 1059.) The state law requires a license, and a failure to take out one is a misdemeanor. (Stats. 1913, sec. 16, p. 283.)

*Lester D. Summerfield*, City Attorney of Reno, for Respondent:

A state automobile license does not authorize a licensee to engage in the jitney bus business of carrying passengers for hire. (*Commonwealth v. Fenton*, 138 Mass. 195, 29 N. E. 653.)

In any event, a state and a city license are both valid. A license exacted on the same business by a city and a county is valid. (*Ex Parte Siebenhauer*, 14 Nev. 365; 4



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Dillon, Mun. Corp., 5th ed. sec. 1408; 2 McQuillin, Mun. Corp., secs. 876, 878, 888; *Brazier v. Phila.*, 64 Atl. 508; *Fairfield v. Shallenberger*, 113 N. W. 469; *Ex Parte Williams*, 31 Tex. Cr. App. 262; *Cross v. N. C.*, 132 U. S. 131, 33 L. Ed. 287.)

Even if the amendments of 1915 are invalid because of defective title, the former charter provisions still remain in full force and effect. (*State v. Crozier*, 12 Nev. 300; 36 Cyc. 1056.)

The statute of 1913, relied upon by petitioner, provides for an operating license, and does not cover vehicles for hire. There is no conflict with the city ordinance or charter provisions which could operate as a repeal. (1 Dillon, Mun. Corp., 5th ed. sec. 235; 2 McQuillin, Mun. Corp., sec. 831; *State v. Labatut*, 39 La. Ann. 516, 2 South. 550.)

If a jitney bus is a vehicle used for hire, and the classification as such, apart from the general classification of automobiles, is a valid one, the authority for the passage of the ordinance is clear and unquestionable. (*State ex rel. Case v. Howell*, 147 Pac. 1159; *Ex Parte Cardinal*, 150 Pac. 348; *Ex Parte Sullivan*, 178 S. W. 537; *Ex Parte Dickey*, 85 S. E. 781.)

By the Court, NORCROSS, C. J.:

This is an original proceeding in *habeas corpus*. Petitioner alleges that he is unlawfully held in custody by the chief of police of the city of Reno upon a charge of misdemeanor for the violation of a certain ordinance in said city, known as City Ordinance No. 183, and entitled:

"An ordinance to fix, impose and provide for the collection of a license tax upon jitney busses, and to regulate the operation and running of the same within the city of Reno; to fix a penalty for the violation of its provisions; and to repeal all ordinances and parts of ordinances in conflict therewith, and particularly City Ordinance No. 176."

Section 1 of the ordinance in question, under the heading "Definition of Terms," provides:

"A 'jitney bus' shall mean and include any self-propelled

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motor vehicle, other than a street-car, employed in the business of carrying passengers for hire over fixed routes, or between certain definite points, within the city of Reno."

Section 2 of the ordinance requires a written application, according to a prescribed form, for a license to engage in the business of operating or running a "jitney bus" to be filed with the city clerk.

Section 3 of the ordinance requires that the written application be accompanied with a surety company bond or a policy of insurance executed by a company authorized to do business in Nevada, in the sum of \$10,000 for the operation of not to exceed one "jitney bus," and \$5,000 for each additional "jitney bus" proposed to be operated, such indemnity bond "conditioned to the effect that in the event of any person or property being injured or damaged by negligence or carelessness in the operation of any jitney bus owned or operated by or under the control of the person filing such indemnity bond, the person so injured in his person or property shall have a right of action thereon. \* \* \*"

Such policy of insurance, if furnished in lieu of a bond, to insure the owner, lessee, or person in control of said "jitney bus against loss by reason of damage that may result to any person or property by reason of negligence or carelessness in the operation of any jitney bus owned, operated, or under the control of the person filing such policy of insurance. \* \* \* Said policy, or policies, of insurance shall guarantee payment of any final judgment rendered against the said owner or lessee of said jitney bus, under the terms and conditions hereinbefore set forth, irrespective of the financial responsibility of the owner, lessee, or person having the control of said jitney bus."

Section 4 of the ordinance provides that the city council shall grant a license to operate such jitney bus or busses upon the approval of such bond or policy of insurance; the other provisions of the ordinance appearing to have been fully complied with.

Section 5 of the ordinance fixes the amount of a quarterly license tax at \$15 for a bus of a capacity of not

exceeding five passengers; \$20 for a bus with a capacity of more than five and less than ten passengers; and \$30 where the capacity of the bus exceeds ten passengers.

Sections 6, 7, and 9-16 of the ordinance contain other provisions in the nature of regulations, not necessary to here refer to.

Section 8 makes it unlawful to operate a "jitney bus" without the prescribed license, and section 17 makes it a misdemeanor to violate any provision of the ordinance.

Section 19 provides:

"This ordinance is hereby declared to be passed and adopted, both for the purpose of revenue and for the regulation of the business herein legislated upon."

It is the contention of petitioner that the ordinance in question is void, in that the city council of the city of Reno is not invested with any power to adopt such an ordinance; that the city council has no power to classify an automobile as a jitney bus or to define the points in the city of Reno over which an automobile should run, or to authorize or compel or demand of petitioner a bond in the sum of \$10,000 or any other sum, before he could run his said automobile, he being licensed by the State of Nevada; that the said ordinance is void because the license tax is not made uniform in proportion to the approximate amount of business done by the licensee, and further, because it is unreasonable and discriminating, in that street railroads, motor cycles, and other vehicles are permitted to use the streets of the city of Reno, without any such qualifications, as the giving of a bond of \$10,000, or the paying of a license therefor.

The so-called "jitney bus" is a very modern institution. Many cities have dealt with the question by ordinance similar to that under consideration in the present case. A few cases involving these ordinances have been decided by courts of last resort in several of the states, and such ordinances have uniformly been sustained: *Ex Parte Dickey* (W. Va.) 85 S. E. 781; *Ex Parte Cardinal* (Cal.) 150 Pac. 348; *Ex Parte Sullivan* (Tex. App.) 178 S. W. 537; *State ex rel. Case v. Howell* (Wash.) 147 Pac. 1159.

In an article appearing in the August, 1915, number of

Case and Comment, entitled "The Jitney Bus as a Factor in Public Service," the author, Mr. Gordon Lee of the New York bar, says:

"Information obtained from mayors, bankers, and railway authorities in various municipalities discloses that out of 138 cities representing 45 states, the District of Columbia, and 8 of the principal cities of the Dominion of Canada, jitney busses are operated at present in 106, leaving 32 in which there is no traffic of this character. \* \* \* Municipal regulations of the business usually prescribe a license fee graduated according to passenger capacity, and require a bond to be given to insure careful and proper operation, and to afford indemnity for damages inflicted. \* \* \*"

1. It is not contended by counsel for petitioner that ordinances regulating the use of automobiles for hire are inherently invalid, but it is contended that the city council of the city of Reno is without power to enact such ordinance.

Subdivision 2 of section 10 of article 12 of the city charter of Reno, as amended by Stats. 1915, p. 253, confers general powers upon the city council to make and pass ordinances.

Subdivision 10 of the same section confers power upon the city council "to fix, impose and collect a license tax on and to regulate all character of lawful trades, callings, industries, occupations, professions, and business, conducted in whole or in part within the city, including \* \* \* (specifically enumerating the same), and all character of lawful business or callings not herein specifically named; *provided*, that in fixing licenses the city council must, as nearly as practicable, make the same uniform in proportion to the approximate amount of business done by the licensee; *and, provided further*, that in fixing licenses hereunder, the city council must have due regard for, and be governed as far as possible by, the approximate amount or volume of business done by each person, firm, company, association, or corporation thus licensed."

Subdivision 12 of the same section confers power upon the city council "to fix, impose, and collect a license tax on and regulate hacks, hackney coaches, cabs, omnibuses, express wagons, drays, job wagons, and all other vehicles used for hire."

Subdivision 18 provides for the issuance of all licenses authorized by the charter and to fix the amount thereof, the times for, the manner of, and the terms upon which the same shall be issued.

Subdivision 37 confers power on the city council:

"To adopt and enforce by ordinance, all such measures, and establish all such regulations in case no express provision is in this charter made, as the city council may from time to time deem expedient and necessary for the promotion and protection of health, comfort, safety, life, welfare, and property of the inhabitants of said city, \* \* \* and to pass and enact ordinances on any other subject of municipal control, or to carry into force or effect any other powers of the city, and to do and perform any, every, and all acts and things necessary or required for the execution of the powers conferred or which may be necessary to fully carry out the purpose and intent thereof."

We think the general and specific provisions of the charter referred to *supra*, confer power upon the city council to adopt an ordinance of the character here in question. A jitney bus, as defined in the ordinance, is, we think, clearly within the special provisions of subdivision 12, *supra*, empowering the city council to impose a license tax on and regulate "all other vehicles used for hire."

Counsel for petitioner cites the case of *Transportation Co. v. Tobin*, 19 App. D. C. 462, as an authority in support of the contention that the expression "all vehicles used for hire" cannot be construed so as to embrace automobiles or so-called "jitney busses." The court, in the *Tobin* case, *supra*, held that the words "other vehicles" contained in the license law of the District of Columbia, passed by the legislative assembly of 1871, and providing

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for a license tax upon "hacks, cabs, omnibuses, and other vehicles for transportation of passengers for hire" would not be held to include motor vehicles used for hire. While the court in that case held that motor vehicles were not "*ejusdem generis*," the court expressed its reason for so holding as follows:

"The language of the section of the act in question is very broad and unqualified, and if the electric vehicles, now used by the defendant, had been known and in use at the time of the passage of the act, there would have been good ground for assuming the applicability of the terms of the act to them, and that their use would have been subject to license, although not specifically mentioned in the act. But it is a known fact, and is conceded, that these electric vehicles are of novel and recent invention as to practical use, and that they were unknown to and certainly not within the contemplation of the authors of the act of the legislative assembly, at the time of the passage of that act, as vehicles for the transportation of passengers."

The reasoning of the opinion that a motor vehicle, because not in existence at the time of the passage of the act, ought not to be considered as of the same general character as hacks, cabs, and omnibuses because of a difference simply in the motive power, does not appeal strongly to us. It is a matter of public and general knowledge that these motor vehicles have very largely displaced hacks, cabs, and omnibuses propelled by horses, and that there is little or no distinction between the two classes of vehicles, other than in the motive power used. There is no distinction whatever in the purpose of use. However, it is clear, from the opinion in the Tobin case, that had motor vehicles been in use at the time of the adoption of the license law for the District of Columbia, in question in that case, the words "other vehicles" would have been construed to include such motor vehicles. The Tobin case was decided in 1902. The provisions of the Reno charter under construction in this case were first adopted by the legislature of 1905, and reenacted by the

amendments of 1915. Motor vehicles were in common use at the time of the adoption of these provisions, and applying the reasoning of the Tobin case to the case at bar the words "all other vehicles used for hire" should be construed to include automobiles or "jitney busses" used for the transportation of passengers for hire.

2. The contention that the amendments of the city charter of the city of Reno, made by the legislature of 1915, are invalid, because the title of the act purports to amend an act theretofore repealed, is without merit. This contention is fully answered by the recent case of *Worthington v. District Court*, 37 Nev. 212, 142 Pac. 233. See, also, 36 Cyc. 1058.

3. The contention of counsel for petitioner, that the ordinance is invalid because not in compliance with the provisions of the city charter providing that all licenses shall be graduated according to the amount of business done, is also, we think, without merit. The provisions of the ordinance regulating the tax according to the seating capacity of the jitney bus is reasonable. This method of fixing license taxes has been sustained in "jitney bus" cases heretofore cited. See, also, *Ex Parte Li Protti*, 68 Cal. 635, 10 Pac. 113; *Bramman v. City of Alameda*, 162 Cal. 648, 124 Pac. 243; 4 Dillon, *Municipal Corporations* (5th ed.) sec. 1410.

The provisions of the ordinance requiring a bond are substantially the same as those contained in ordinances brought into question in "jitney bus" cases cited *supra*. The reasons given for sustaining the requirement of a bond are manifest and convincing. Speaking to this question, the Supreme Court of California in *Ex Parte Cardinal*, *supra*, said:

"We see no reason to doubt the power of the state, or any county or municipality, in the exercise of its police power of regulation, to require security in the shape of a bond or insurance policy from its licensees in all cases where the giving of such security may fairly be held to be a reasonable requirement for the protection of the public. \* \* \* In the case at bar we have persons

undertaking to pursue upon the public streets of the city and county of San Francisco an occupation that if negligently conducted is fraught with danger, not only to those who may be passengers, but also to the public generally upon those streets. The occupation is one that may properly be regulated by the public authorities, and the insistence on a bond or other security in a reasonable amount to indemnify those who may be injured by the negligent or illegal operation of the business appears to us not to be beyond the range of reasonable requirement."

The question was considered at great length by the Court of Criminal Appeals of Texas in *Ex Parte Sullivan*, *supra*. From the opinion we quote the following excerpts:

"On this point, as we see it, it resolves itself into whether or not the judges of this court can say, as a matter of law, that to require of the jitney man to procure such a bond as a prerequisite to his running his business in the streets of Fort Worth is so unreasonable and oppressive as a regulation of the business as to render that provision of the ordinance void. We have no knowledge on the subject other than is disclosed by the facts and record in this case, and the knowledge that we are presumed to possess in common with all other men. On the other hand, the city of Fort Worth and its governing commissioners must have knowledge, and we must presume they have, which we cannot have. \* \* \* We have had much difficulty in reaching a correct and satisfactory conclusion as to whether or not requiring the jitney operators to procure such bond, and not the other classes of common carriers of passengers for hire in the city, is so unreasonable or such a discrimination as to make this feature of the ordinance void. From our study of the facts and the law applicable, we think it reasonably certain that the record shows three separate and distinct classes of common carriers of passengers for hire in said city (outside of the steam and interurban railways not under consideration), to wit: First, the street-car; second, the ordinary hack and automobile; and, third, the jitney. Clearly, the city so regarded them and acted upon such



distinction." "In our opinion the agreed facts in this case show such a marked distinction between the three characters of passenger carriers for hire and the extent and manner of their use of the streets as to justify the city in requiring the operator of the jitney to give such bond and in not requiring either of the other classes of carriers to do so, and that we cannot therefore hold this provision of the ordinance void."

4. It is contended that because petitioner has a state license granted in accordance with the provisions of an act of the legislature entitled "An act regulating automobiles or motor vehicles on public roads, highways, parks or parkways, streets and avenues, within the state of Nevada; providing a license for the operation thereof and prescribing penalties for its violation; designating the manner of handling the receipts therefrom and the purpose for which it may be expended and in what manner," approved March 24, 1913 (Stats. 1913, p. 280), that no other license may be required. This latter statute requires all owners of automobiles to procure a license from the secretary of state. The license fee required by this latter act is determined at the rate of 12½ cents per horsepower. The act contains many provisions regulating the use of automobiles or motor vehicles upon the public highways of the state.

Section 14 of the act provides:

"The local authorities of incorporated or unincorporated cities or towns may regulate by ordinance, rule, or regulation hereafter adopted, the speed of motor vehicles within the limits of such cities or towns. \* \* \*

Section 15 of the act provides:

"This act shall in no wise affect any statute now existent or that may hereafter be enacted providing for a license on automobiles for hire."

It is the contention of counsel for petitioner that the provision of section 14, *supra*, is a limitation upon the power of the authorities of any incorporated city to regulate the use of automobiles or motor vehicles other than in the matter of speed, and that the provisions of

section 15, regulating a "license on automobiles for hire," limits the power to make such regulation by the legislature only.

It is clear from the whole scope and purpose of the act of 1913 that it was not intended to deal with automobiles for hire as distinct from automobiles generally. The legislature will be presumed to know that, when it passed the act of 1913, it could not limit the power of subsequent legislatures to enact a law imposing an additional license on automobiles used for hire. It is presumed, also, that the legislature knew that there was no existing general statute imposing a license on automobiles used for hire. While the word "statute" is generally used to refer to acts passed by a legislature, the word is not always used with such a strict limitation. Applying, however, the strict definition of the word "statute" to the section in question, nevertheless, we think the section will not warrant so narrow a construction as to place any limitations upon the power of the city council of the city of Reno to impose a license upon automobiles used for hire and coming within the definition of a "jitney bus" as defined in the ordinance. The city charter of the city of Reno is a statute, and this statute empowers the city council of the city of Reno to impose a license upon "vehicles used for hire." An automobile is a vehicle, and if it is used for hire, statutory power exists in the city council to impose a license thereon. The construction we have placed on section 15 makes it unnecessary to consider the contention made in reference to section 14.

The act of 1913, regulating automobiles or motor vehicles, is not in conflict with the city charter of the city of Reno, nor with the ordinance in question. The act of 1913 applies to all automobiles whether used for hire or otherwise, and whether operated within or without the limits of an incorporated city. The owner of an automobile who desires to engage in the business of conducting an automobile for hire within the city of Reno must, in addition to complying with the general regulations prescribed by the statute of 1913, also comply with the

ordinance of the city. (*Ex Parte Siebenhauer*, 14 Nev. 365; *Comm. v. Fenton*, 139 Mass. 195, 29 N. E. 653; *Brazier v. Philadelphia*, 215 Pa. 297, 64 Atl. 508, 7 Ann. Cas. 548; *Ex Parte Dickey*, 85 S. E. 781; *Dillon, Municipal Corporations*, vol. 4, sec. 1408; *McQuillin, Municipal Corporations*, vol. 2, sec. 876.)

Our conclusion is that the ordinance is valid, and that petitioner is not unlawfully restrained of his liberty. As said by the Supreme Court of West Virginia in *Ex Parte Dickey, supra*:

"It (the 'jitney bus' ordinance) may be burdensome and, in the opinion of many people, oppressive and unwise, just as many other valid laws are regarded. But the question submitted here is one of municipal power, not policy. With the latter the courts have nothing to do, nor can they overthrow laws, ordinances, or regulations made by competent authority, merely because, in the opinion of the judges, they might or should have been made more liberal or less rigorous."

Counsel for petitioner and the city attorney of the city of Reno agreed that the questions presented in the petition might be determined upon application for the writ.

It is therefore ordered that the petition for the writ be denied.

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## Argument for Appellant

[No. 2111]

## ADA RITA ROSENTHAL, RESPONDENT, v. HUBERT SEMMY ROSENTHAL, APPELLANT.

[153 Pac. 91]

## 1. APPEAL AND ERROR—ORDERS REVIEWABLE—DENIAL OF CONTINUANCE.

An order of the trial court dismissing a motion for a continuance is not directly appealable.

## 2. APPEAL AND ERROR—RECORD ON APPEAL—STATEMENT AND BILL OF EXCEPTIONS.

In the absence of a statement on appeal or bill of exceptions, the appellate court is confined to examination of the judgment roll alone, and cannot review the denial of a continuance to take depositions.

## 3. APPEAL AND ERROR—APPEALABLE ORDERS—STATUTES.

Rev. Laws, 5339, providing that, upon an appeal from an order made on affidavit, a certified copy of the affidavit and counter affidavit shall be annexed to the order in place of the statement on appeal, and section 5356, providing that on appeal from an order appellant shall furnish the court with a copy of the notice of appeal, the order appealed from, and a copy of the papers used on the hearing, and a statement. If there be one, apply to appealable orders only, and do not give an appeal from orders not otherwise appealable.

## 4. APPEAL AND ERROR—ORDERS REVIEWABLE—DENIAL OF CONTINUANCE.

An order denying a motion for a continuance can only be reviewed by appeal from a judgment or order refusing a new trial, or by bill of exceptions properly allowed by the trial court.

**APPEAL** from First Judicial District Court, Ormsby County; *Frank P. Langan*, Judge.

Action by Ada Rita Rosenthal against Hubert Semmy Rosenthal. From a final judgment, and an order refusing a continuance, defendant appeals. Appeal from order dismissed. **Judgment affirmed.**

*John M. Chartz*, for Appellant:

The lower court abused its discretion in refusing the continuance and in rendering judgment. Appellant was entitled to a continuance on the ground of the absence of evidence, depositions of witnesses not having arrived, and appellant having made affidavit of the materiality of the

## Argument for Respondent

expected evidence and that due diligence had been used to procure it. (Dist. Court Rule XII, Rev. Laws, p. 1427; Rev. Laws, 5202.)

The continuance should have been granted, as the affidavits showed upon their face the expectancy of the arrival of the depositions within a short time. (*Choate & Brown v. Bullion M. Co.*, 1 Nev. 73; *Calhoun v. M. & T. Bank*, 28 La. Ann. 260; Ency. Pl. & Pr., vol. 4, pp. 846-850.)

The transcript on appeal contains all the proper and necessary papers. A bill of exceptions is improper, and when taken will be disregarded on appeal. (Ency. Pl. & Pr., vol. 3, p. 381.)

A motion for a new trial was not necessary. (*Beatty v. Sylvester*, 3 Nev. 228; Rev. Laws, 5339.) No statement on appeal was necessary. (*Weinrich v. Porteus*, 12 Nev. 102; *Gray v. Harrison*, 1 Nev. 502; *Thompson v. Lake*, 19 Nev. 293; *Smith v. Wells Estate Co.*, 29 Nev. 411.)

An order of the lower court granting or refusing a continuance is appealable. (Ency. Pl. & Pr., vol. 4, pp. 902-904; *Nichols v. Headley G. Co.*, 66 Mo. App. 321.)

*Platt & Sanford*, for Respondent:

The appeal from the judgment and order refusing to grant a continuance should be dismissed, there being no record on appeal before this court, as required by statute and the rules of the court. (Rev. Laws, 5325-5329.) The procedure in taking appeals, and the questions to be discussed thereunder by the appellate court, are matters of statutory regulation, and the court can consider only what is properly presented to it. (*Burbank v. Rives*, 20 Nev. 81; *State v. Preston*, 30 Nev. 301; *Luke v. Coffee*, 31 Nev. 165.) The provisions of the code as to the preparation of a case on appeal are for observance, and not merely suggestions. (*Sprigg v. Barber*, 54 Pac. 899.)

The judgment should be affirmed, as it is supported by the pleadings, and no error appears upon the face of the judgment roll. The transcript filed by appellant contains no statement, bill of exceptions, or motion for new trial, and therefore only the appeal from the final judgment

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can be considered. (*Irwin v. Sampson*, 10 Nev. 282; *Baum v. Meyer*, 16 Nev. 91.) Where there is no statement properly authenticated, only errors appearing on the face of the judgment roll can be considered on appeal. (*Quinn v. Quinn*, 27 Nev. 156; *Werner v. Babcock*, 34 Nev. 44; *State v. Wilson*, 5 Nev. 43.)

An order granting or refusing a continuance is not an appealable order. (*Luke v. Coffee*, 31 Nev. 165; *State v. Wallin*, 6 Nev. 280; *Tiedemann v. Tiedemann*, 35 Nev. 265; *Haraszthy v. Horton*, 46 Cal. 545; *People v. Ashnaur*, 47 Cal. 98; *Jacks v. Buel*, 47 Cal. 162.)

There was no abuse of discretion in the refusal of the court to grant the continuance. (*Luke v. Coffee*, 31 Nev. 165; 9 Cyc. 120; *Hardy v. U. S.*, 186 U. S. 224.)

Not the exercise of discretion, but its abuse, is reviewable. (*Watson v. Columbia B. Co.*, 135 Pac. 511-514.) The party taking depositions must exercise diligence. (*Cooper v. Mitchell*, 1 Phila. 73.)

By the Court, MCCARRAN, J.:

The notice of appeal filed in this case states that it is an appeal from the final judgment and from an order refusing a continuance. Respondent has moved to dismiss the appeal, upon the ground that there is no record before this court, as required by the statutes of Nevada and the rules of the court.

It appears from the record that, prior to the trial of the cause, defendant in the court below, appellant herein, moved the court for a continuance for the purpose of procuring the depositions of witnesses. The motion for continuance being denied by the court, the cause proceeded to trial and final judgment, in which a decree of divorce was issued. In this case appellant appears here without bill of exceptions or statement on appeal.

1. An order of the trial court in allowing or dismissing the motion for continuance is not of itself an appealable order, and can be reviewed only on appeal from the final judgment. (Rev. Laws, 5329; *Whitefoot v. Leffingwell*, 90 Wis. 182, 63 N. W. 82; *Jaffray v. Thompson*, 65 Iowa, 323,

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21 N. W. 659; *Shearouse v. Smith*, 83 Ga. 520, 11 S. E. 560; *State v. Ducker*, 35 Nev. 214, 127 Pac. 990; *Haraszthy v. Horton*, 46 Cal. 545.)

2. In the case of *State v. Wallin*, 6 Nev. 280, this court held that where there was no bill of exceptions, and no statement on appeal, and the affidavits in support of the motion for continuance were not properly in the transcript, the alleged error of the trial court in refusing a continuance could not be considered by this court. In the case of *State v. Preston*, 30 Nev. 307, 95 Pac. 920, this court said:

"The supreme court of this state, to be clothed with jurisdiction to adjudicate whatever questions are properly raised by an appeal from an inferior court, must be connected with the proceedings had in the lower court substantially in the manner required by the statutes regulating appeals; otherwise, this court acquires no jurisdiction. If any of these essential links required by mandatory statutes and necessary to give this court jurisdiction are lacking, the attempted appeal confers no jurisdiction on this court, and the proceedings must be dismissed."

It has been repeatedly held by this court that, in the absence of a statement on appeal or bill of exceptions, this court is confined to a consideration of the judgment roll alone. (*Werner v. Babcock*, 34 Nev. 42, 116 Pac. 357, and cases there referred to.)

3. We are referred by appellant to certain sections of the civil practice act, to wit, sections 5339 and 5356, Rev. Laws:

"SEC. 5339. The provisions of the last preceding section shall not apply to appeals taken from an order made upon affidavit filed, but a certified copy of such affidavit and counter affidavit, if any, shall be annexed to the order, in the place of the statement on appeal mentioned in that section."

"SEC. 5356. \* \* \* On an appeal from an order, the appellant shall furnish the court with a copy of the notice of appeal, the order appealed from, and a copy of the

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papers used on the hearing in the court below, and a statement if there be one, such copies to be certified in like manner to be correct. \* \* \* If the appellant fails to furnish the requisite papers, the appeal may be dismissed."

In our judgment, the sections of the statute here cited apply to appealable orders. To say that an appeal might be taken from every order made by a court during the pendency of an action would be to give sanction to a multiplicity of appeals growing out of a single litigation, attended as such a course would be by expense and inestimable delay. A modern and very reliable commentary puts it that:

"Judgments and orders from which an appeal will lie are those which either terminate the action or operate to divest some right in such a manner as to put it out of the power of the court making the order to place the parties in their original condition after the expiration of the term." (2 R. C. L. 22.)

In the same work we find it stated:

"An order granting or refusing a continuance is, of course, in no way final, and it may safely be stated that such an order is not reviewable on appeal or writ of error before final judgment." (2 R. C. L. 30.)

If further authority were necessary to support the proposition that an order granting or refusing a continuance is not, as a general rule, appealable, it would be only necessary to cite the decisions of the courts of many states set forth in support of that rule in a very recent publication. (3 Corpus Juris, p. 473, sec. 295.) We recognize, without comment here, that this rule may be subject to exception, and has been so held in cases where the rights of the parties would be permanently affected. (*Humburg v. Namura*, 13 Hawaii, 702.)

We are referred by appellant to the case of *Beatty v. Sylvester*, 3 Nev. 228, in support of his contention that it was not necessary to bring the appeal from the order to this court either by a bill of exceptions or statement on motion for a new trial. It will be observed, however,



that in the case cited the error complained of was brought to this court by way of bill of exceptions, and the method of appeal was not attacked. The decision of this court in the case of *Weinrich v. Porteus*, 12 Nev. 102, if applicable at all, could only be so in the event that the order appealed from was in fact an appealable order, one specifically recognized as such by statute or by rule; and, as we have already stated, an order denying a motion for a continuance does not come within this class. The case of *Thompson v. Bank*, 19 Nev. 293, 9 Pac. 883, is not in point. The case of *Smith v. Wells Estate Co.*, 29 Nev. 411, 91 Pac. 315, if applicable at all, supports the position that we take here.

4. The order of the trial court denying the appellant's motion for continuance not being an order from which a direct appeal could be taken, it is our judgment that the action of the trial court in this respect could only be reviewed by this court when brought here by one of the avenues prescribed by the statute; *i. e.*, by appeal from the judgment or order refusing a new trial, or by bill of exceptions properly allowed by the trial court. There being no bill of exceptions or statement on appeal in the record presented to this court, and the statute permitting no direct appeal from an order denying a motion for continuance, the direct appeal here attempted from the order must be dismissed.

On an appeal from the judgment alone, without statement or bill of exceptions, this court can only consider the record constituting the judgment roll. (*Peers v. Reed*, 23 Nev. 404, 48 Pac. 897; *Werner v. Babcock*, *supra*; *Western Eng. & Const. Co. v. Nevada Amusement Co.*, 33 Nev. 203, 110 Pac. 1129.) No error is contended for as existing in the judgment roll.

The judgment should be affirmed. It is so ordered.

## Points decided

[No. 2120]

**WALTER WARD, RESPONDENT, v. PITTSBURG SILVER PEAK GOLD MINING COMPANY (A CORPORATION), APPELLANT.**

[148 Pac. 345; 153 Pac. 434]

**1. APPEAL AND ERROR—DENIAL OF NEW TRIAL—MEMORANDUM OF EXCEPTIONS AS EXCEPTIONS ON APPEAL.**

Rev. Laws, 5320, specifies the causes for which new trials may be granted. Sections 5321, 5322, provide that a motion for error in law occurring at the trial and excepted to by the party making application must be made upon the minutes of the court without statement or bill of exceptions, and that the moving party shall, within ten days after the service of motion for new trial, serve upon the adverse party a memorandum of such errors as he intends to rely on upon the motion, verified by his attorney. Section 5325 provides that a judgment or order in a civil case may be reviewed as prescribed by the title. Section 5328 provides that when the appeal is based on the ground of errors in rulings on the evidence or upon the giving of erroneous instructions, appellant must present his motion for a new trial to the trial court and have it determined before the appeal can be taken. Section 5331 defines a statement on appeal and presents the method of serving, filing, settling, and amending the same. Section 5335 provides that the omission to make a statement within the time limited shall be deemed a waiver of the right thereto, and the omission of proposed amendments an implied agreement to the statement, and section 5343 provides that a bill of exceptions may be taken to the order or ruling of the court, which shall be signed by the presiding judge and become a part of the record, and that any party aggrieved may appeal from the judgment or any appealable order without further statement or motion. Defendant filed a "Memorandum of Exceptions," submitted and relied upon in support of its motion for a new trial, which was verified by its attorney, but not settled by the court. *Held*, that the memorandum could not be considered as filling the office of bills of exceptions or a statement on appeal.

**ON REHEARING****1. APPEAL AND ERROR—DISMISSAL OF APPEAL—DEFECTS IN PROCEEDINGS.**

Within Rev. Laws, 5358, providing that an appeal shall not be dismissed for any irregularity not affecting the jurisdiction of the court to hear and determine the appeal, or affecting the substantial rights of the parties, where there was no bill of exceptions or statement on appeal, but only a memorandum of exceptions for use on a motion for a new trial, the matter was one of jurisdiction.

Argument for Appellant

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**2. APPEAL AND ERROR—DISMISSAL OF APPEAL—DEFECTS IN PROCEEDINGS.**

Notwithstanding Rev. Laws, 5358, where appellant fails to comply, at least substantially, with the provisions of the statute, the court can do nothing but dismiss the appeal, as the right of appeal is regulated by statute.

APPEAL from Second Judicial District Court, Washoe County; *Thomas F. Moran*, Judge.

Action by Walter Ward against the Pittsburg Silver Peak Gold Mining Company. Judgment for plaintiff, and from the denial of its motion for a new trial, defendant appeals. **Affirmed.**

*Samuel Platt*, for Appellant:

The following excerpt, taken from page 472 of the 37th Nevada Reports, is significant:

“If such a bill of exceptions were so properly settled, it would be a bill of exceptions upon which an appeal could be taken, although it might be improperly labeled a ‘Memorandum of Exceptions.’”

It is obvious, from the above direct statement in the first opinion, that it is immaterial whether a so-called bill of exceptions may be designated a memorandum of exceptions, provided it had been properly settled. The court originally disregards the form and considers the substance. It is interested in knowing the facts of filing, serving, opportunity for amending, submissions, and presentation for allowance and settlement, and whether in fact the memorandum of exceptions was properly before and considered by the judge on the hearing on motion for a new trial.

Appellant had the right to have the first exception in the memorandum settled or allowed by the judge and appeal upon it directly from the judgment, or he had the equal right to present it with others to the district judge on motion for a new trial. If he chose the latter method, he was entitled to have his exceptions considered on appeal.

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Argument for Respondent

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The fundamental legal reason entitling appellant to have the exceptions presented on motion for a new trial reviewed by the supreme court is that the district judge first had an opportunity to pass upon them before he denied the motion for a new trial.

The mandatory provision found in Rev. Laws, 5328, is in direct conflict with section 5343, Rev. Laws, which specifically provides for a reviewing of all rulings during the trial of a cause by bill of exceptions, regardless of a motion for a new trial. This last section cited is the portion of the statute commented upon by the court and of which quotation is above made.

It was absolutely impossible for the plaintiff or his counsel to have been prejudiced or misled by the caption of the bill. If, as is well stated by the court, the so-called "Bill of Exceptions" need only be presented to the trial court for signing, and is, as a matter of fact, purely *ex parte*, how could the other party or his counsel be prejudiced? The trial judge signed the bill and it was filed, and this court holds that "this bill of exceptions, when thus signed by the trial judge and filed, becomes a part of the record."

*Dixon & Miller and J. B. Dixon, for Respondent:*

There was no sufficient evidence that any bill of exceptions had been considered or allowed as a bill of exceptions by the trial court. In the record presented to the court, there was absolutely no evidence that the memorandum of exceptions had ever at any time been presented to the trial court as or for a bill of exceptions. The record contains absolutely no evidence of notice that this memorandum of exceptions would at any time be presented to the trial court as a bill of exceptions.

Under the provisions of section 5321 of the Revised Laws, the party moving for a new trial was specifically denied the right to present or use a bill of exceptions, but was restricted to the use of a memorandum of exceptions which was required to be verified by counsel for the defendant appellant.

By the Court, MCCARRAN, J.:

In this action, on April 13, 1914, respondent moved to dismiss the appeal. The motion to dismiss the appeal from the final judgment was based upon the ground that the appeal from that judgment was not taken within six months after the entry thereof. The motion to dismiss the appeal from the order denying a new trial was based upon the ground that appellant did not, within twenty days after the rendition of the judgment, or within twenty days after the making of the order denying a motion for a new trial, or at any time, file or serve any statement on appeal. As to the motion to dismiss the appeal from the final judgment, this court, speaking through Mr. Chief Justice Talbot, decided that respondent's motion to dismiss was well taken, and the order was entered that the appeal from the final judgment be dismissed. (*Ward v. Pittsburg Silver Peak Gold Mining Co.*, 37 Nev. 473.) As to the appeal from the order denying appellant's motion for a new trial, in the case of *Ward v. Pittsburg Silver Peak Gold Mining Co.*, *supra*, we said:

"The case will be retained for consideration on appeal for such questions as may duly appear from the record and from the minutes of the court when admitted to have been properly before and considered by the district judge in passing upon the motion for a new trial. The papers, not appearing to have been before or so considered by the court upon the hearing of the motion for a new trial, or properly before this court, may later be stricken from the files. As to which papers these should be, counsel may present their views when argument is had upon the merits. \* \* \* The other motions of the respondent are denied for the present, subject to the right of the court to eliminate from the files any papers after the minutes which will be admitted have been considered and argument had."

On the final argument of this case, counsel for respondent renewed their motion to dismiss the appeal from the order denying a new trial.

The first contention of counsel for respondent is that a certain instrument, entitled "Memorandum of Exceptions," embodied in the judgment roll, should be stricken from the files, inasmuch as it has no place in the judgment roll. Counsel's second contention is that no statement on appeal or bill of exceptions was ever filed by appellant in the case, and that therefore there is nothing before this court for review. We shall deal with both propositions in one consideration.

Our appellate jurisdiction governing cases brought to this court from the several district courts, strictly speaking, is found in the sections of the Revised Laws Nos. 5325 to 5361, inclusive. The procedure governing applications for new trial is contained in section 5319 to section 5324, inclusive. The procedure, or the essential steps of the procedure, in furtherance of motion for a new trial, made before the trial judge in the district court, must not be confused with the several steps essential to the perfection of an appeal from the district court to the supreme court. Each procedure and each step in the respective procedure is essentially independent of the other. Section 5322, Revised Laws, being section 380 of the civil practice act, pertaining to applications for a new trial, sets forth:

"Where the motion is made upon the seventh cause mentioned in the preceding section (error in law occurring at the trial and excepted to by the party making the application), the party moving shall, within ten days after the service of notice of motion for a new trial, unless further time be obtained by stipulation or order of the court, serve upon the adverse party a memorandum of such errors excepted to as he intends to rely on upon the motion, and such memorandum shall contain a verified statement of his attorney that in the judgment of such attorney the exceptions so relied upon are well taken in the law. No other errors under subdivision 7 shall be considered either upon the motion for a new trial or upon appeal than those mentioned in such memorandum."

By the preceding section, to wit, section 379 of the civil practice act, it is provided that where the motion for a new trial is made upon the fifth, sixth, or seventh grounds (excessive damages appearing to have been given under the influence of passion or prejudice; insufficiency of the evidence to justify the verdict or other decision, or that it is against law; error in law occurring at the trial and excepted to by the party making the application), it must be made upon the minutes of the court, without statement or bill of exceptions. Reading these two sections together, the procedure may be stated in simple language as follows: Where the application for the new trial is made upon the first, second, third, or fourth ground as set forth in section 378 of the civil practice act, the application must be supported by affidavit. Where the application for a new trial is made upon the fifth or sixth ground, the movant must rely upon the minutes of the court and pleadings, and the orders, the depositions, and documentary evidence, and the stenographic notes or report of the testimony and the records of the court had, made, taken, or entered during the course of the proceedings. If the motion for a new trial is based upon the seventh ground, as set forth in section 378, the movant must, within ten days after the service of notice of motion, unless further time be obtained by stipulation or order of the court, serve upon the adverse party a memorandum of such errors excepted to as he intends to rely on in furtherance of his statement that, in his judgment, the exceptions so relied upon are well taken in the law. Where the movant relies upon the seventh cause, he can assert no other errors under that cause than those which he specifically sets forth in his verified memorandum of errors. From these several provisions of the civil practice act, it must be observed that each of the several phases mentioned are essential steps in the procedure on motion for a new trial.

Section 5325, Revised Laws, being section 383 of the civil practice act, prescribes that:

“A judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this title, and not otherwise.”

By the provisions of section 386 of the civil practice act, the party who seeks to appeal upon the ground either that the evidence is insufficient to justify the verdict or the decision of the court, or to support the findings, or who appeals upon alleged errors in rulings upon the evidence, or upon the giving of instructions claimed to be erroneous, must present his motion for a new trial to the trial court and have the same determined before the appeal can be taken.

Section 389 of the civil practice act defines a statement on appeal, and prescribes the method of preparing, serving, filing, and finally settling the same, and, in part, is as follows:

“When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall, within twenty days after the entry of such judgment or order, if he or his attorney was present at the time of the making or entry thereof, or if the appeal is from a judgment based upon a verdict, and in other cases within twenty days after receiving written notice of the entry of the judgment or order, prepare a proposed statement, and number the pages and lines thereof, which proposed statement shall specify the particular errors or grounds upon which he intends to rely on the appeal, and shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more, and shall file the same with the clerk and serve a copy thereof upon the adverse party. \* \* \* The respondent may, within ten days thereafter, prepare and file amendments to the statement.”

Section 393 of the civil practice act provides:

“If the party shall omit to make a statement within the time limited, he shall be deemed to have waived his right thereto; and when a statement is made and the parties shall omit within the several times above limited,



the one party to propose amendments, the other to give the notice that he declines to admit the amendments, they shall respectively be deemed, the former to have agreed to the statement as prepared, and the latter to have agreed to the amendments as proposed; but the judge or referee who tried or heard the case shall, notwithstanding such omission or implied agreement, have power to correct any misstatement of his rulings which such statement may contain."

This latter section has received construction by this court in several cases. In the case of *Williams v. Rice*, 13 Nev. 234, Mr. Chief Justice Hawley, in speaking for the court, held that when an appeal is only taken from a judgment, a statement that had been prepared and used as a statement on motion for a new trial cannot be considered as a statement on appeal. The case of *Williams v. Rice*, *supra*, is especially significant in the consideration of the case at bar, in view of the fact that the statement on motion for a new trial mentioned by the court in that decision has been since done away with, and its place is filled by that which is termed "Memorandum of Exceptions," as prescribed by section 380 of the civil practice act. In the *Williams-Rice* case, *supra*, it was contended by the appellant that, inasmuch as the statement on motion for a new trial was filed within the time allowed by law for the preparation of a statement on appeal, the appellate court ought to consider it as a statement on appeal, regardless of the fact that it did not purport to be such statement. In the case at bar, it is the contention of counsel for appellant that the memorandum of exceptions included in the record on appeal should be considered as a bill of exceptions as contemplated by section 401 of the civil practice act (section 5343, Revised Laws). The terms of the last-mentioned section are as follows:

"At the time a decision, order or ruling is made, and during the progress of the cause, before or after judgment, if the opposing party or his attorney be present, a party may take his bill of exceptions to the decision,

order, admission, or exclusion of testimony or evidence, or other ruling of the court or judge on points of law, and it shall not be necessary to embody in such bill anything more than sufficient facts to show the point or pertinency of the exceptions taken. The presiding judge shall sign the same as the truth of the case may be, and such bill shall then become a part of the record, and any party aggrieved may appeal from the judgment or any appealable order without further statement or motion; and on such appeal it shall only be necessary to bring to the supreme court a transcript of the pleadings, the judgment, and the bill or bills of exception so taken."

The contention of counsel for appellant in the case at bar is that, the instrument entitled "Memorandum of Exceptions" having been filed prior to the order denying appellant's motion for a new trial, it should be regarded by this court as a bill of exceptions, and counsel, in his brief especially refers us to section 5343, Revised Laws, quoted above. But can this memorandum of exceptions, so-called, be regarded in any sense as a bill of exceptions such as that contemplated by section 5343? We think not. Upon its very face the instrument shows that it was not so regarded by appellant in the court below. The instrument is entitled "Memorandum of Exceptions." This entitling, of itself, would have no special significance if it were otherwise in conformity with section 5343, Revised Laws. But, aside from that, the instrument in its introduction is as follows:

"The following memorandum of exceptions is herewith submitted and relied upon in support of defendant's motion for a new trial, duly noticed, and which said exceptions, and each thereof, are material and affect the substantial rights of defendant, and were duly taken and noted in open court to the rulings of the above-entitled court upon the trial thereof, and which said rulings are herewith assigned as error, prejudicial to the defendant, material, affecting

defendant's substantial rights and entitling it to a new trial."

At the conclusion there appears the verification of one of the counsel for appellant, and this verification in its phraseology distinctly shows the purpose for which the instrument and the various assignments therein contained were intended. Moreover, it shows clearly that it was a proceeding resorted to by appellant in furtherance of the motion for a new trial before the court below, under the provisions of section 5322, Revised Laws. The verification of attorney for appellant in this respect is as follows:

"State of Nevada, County of Ormsby—ss.:

"Samuel Platt, being first duly sworn, upon oath deposes and says that he is one of the attorneys for the defendant and movant in the above-entitled case, and that in his judgment the above and within exceptions, hereinabove appearing in said memorandum of exceptions, are well taken in the law."

No such verification as this is required, either of counsel or of the litigant, by section 5343. The whole proceeding, as disclosed by the record, clearly indicates that this memorandum of exceptions was not regarded by the appellant or by the trial judge in the court below as a bill of exceptions such as is contemplated by section 5343. Under the procedure providing for the taking of appeal to this court, as prescribed by our statute, two methods are provided, and these are separate and distinct from each other. The one which is set forth by section 5331 makes provision for a statement of the case to be annexed to the record of the judgment or order appealed from, when the party appealing wishes such statement to be annexed. The other, which is provided by section 5343, makes no provision for, nor does it contemplate, the bringing of a statement of the case to the court of review. This provision contemplates a list of exceptions taken by the aggrieved party to the decisions, order, or rulings upon the admission or exclusion of testimony or evidence,

or other ruling of the court or judge on points of law during the course of the proceeding. It makes no provision for verification, nor does it require such, nor is it necessary to do more than to present this bill of exceptions, in the presence of the opposing party or his counsel, to the trial judge, who is required to sign the same after such bill has been made to conform to the truth according to the record. This bill of exceptions, when thus signed by the trial judge and filed, becomes a part of the record, and, as the statute sets forth, the party aggrieved may appeal from the judgment or any appealable order without further statement or motion. But a memorandum of exceptions such as that set forth in the record in this case, used and regarded as a memorandum of exceptions in the court below, and used and regarded solely in furtherance of appellant's motion for a new trial, cannot be held to fill an entirely different office when brought to this court. (*Western E. Co. v. Nev. A. Co.*, 33 Nev. 203, 110 Pac. 1129.)

Under section 5343, Revised Laws, it is clearly contemplated, when a bill of exceptions is taken, signed by the judge "as the truth of the case may be," that "the opposing party or his attorney be present." The purpose of providing for the presence of the opposing party or his attorney is to offer an opportunity to be heard in the matter of the settlement or allowance of the bill or bills of exceptions. The opposing party or his attorney have nothing whatever to do with the memorandum of exceptions filed and served in support of a motion for a new trial, nor with an assignment of errors embodied in a statement on appeal from a judgment or order. A party may make such memorandum of exceptions or assignment of errors as he may see fit. As said by Beatty, C. J., in *Fleeson v. Savage Silver Mining Co.*, 3 Nev. 167:

"The defeated party in any cause may file an assignment of error, containing anything he may choose to insert therein. He may assign a hundred errors having

no foundation in fact and no connection with the case. The opposing counsel, in settling the statement, could not deny the filing of such an assignment of errors."

It not only clearly appears in this case that the memorandum of exceptions does not purport to be a bill of exceptions signed by the judge in accordance with section 5343, *supra*, but that they were not settled or signed in the presence of the opposing party or his attorney, nor was any opportunity afforded them to be heard in reference thereto.

In the case of *Williams v. Rice*, *supra*, Mr. Justice Beatty, in dissenting from the prevailing opinion, held that a statement on motion for a new trial could also serve the purpose of a statement on appeal, and speaking of the statement before the court in that case, he said:

"In this case the statement was settled, engrossed, certified, and filed within five days after judgment.  
\* \* \* It was made and settled, certified, and filed in exact conformity with every requirement of sections 332, 333, 334, and 335 of the practice act."

The reasoning set forth in the dissenting opinion of that able jurist would not serve here to further the contention of appellant that the memorandum of exceptions could serve in the place of a statement on appeal, much less that it could take the place of the bill of exceptions. In the case at bar there was no settlement of the memorandum of exceptions, so called. A blank form of settlement, drawn to be signed by the district judge, and set forth on page 115 of the record attached to the memorandum of exceptions was neither dated nor signed by the trial judge. Hence it follows that, even were we inclined to agree with the reasoning set forth in the dissenting opinion of Mr. Justice Beatty in the *Williams-Rice* case, *supra*, as affording a solution to the matter at bar, to relieve the appellant of the fatal omission, we are precluded from doing so, in view of the fact that the provisions of the statute applicable to the settlement of statements on appeal were not

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complied with here, in that the district judge did not assume to settle such statement or to regard it as a statement on appeal or bill of exceptions.

There is nothing in the statute, as we view it, that would authorize a memorandum of exceptions, made and filed in furtherance of a motion for a new trial, to assume the office of a statement on appeal. The opposing party in any action is always vitally interested in the proposed statement on appeal, required to be filed and served before settlement by the trial judge, under provisions of section 389 of the civil practice act. Whether the assignment of errors may or may not be well taken depends upon the statement on appeal as finally settled. If the opposing party is not satisfied with the proposed statement, he may propose amendments thereto, and may be heard upon the question of the allowance of his proposed amendments. If no proposed amendments are filed, the opposing party is deemed to assent to the proposed statement. It necessarily follows, not only from the language of the statute governing the settlement of a statement on appeal, but from the manifest reason upon which the statute is based, that an assignment of errors that is not supported by a duly settled statement on appeal can have no force or effect whatever. In this case there is neither a bill of exceptions nor a statement on appeal, settled or allowed by the trial judge, or with which the opposing party has had any opportunity to be heard thereon.

This so-called memorandum of exceptions, designated as such, was filed in the court below and served on the respondent, and respondent was bound to take notice of the purposes for which the memorandum of exceptions would be used, and none other, namely: "Relied upon in support of defendant's motion for a new trial, duly noticed." If the so-called memorandum of exceptions was to be regarded as having the force and effect of a statement on appeal, then, under the provision of section 5331, the respondent would have been entitled to an opportunity to present such amendments to that

statement as he saw fit, and to have the same passed upon by the trial court. To now give this instrument the dignity of a statement on appeal would be not only to disregard the specific provisions of the statute, but would be to deprive the respondent of that right which the statute and procedure accorded him. Respondent was not bound, nor was he even privileged, to submit amendments to a memorandum of exceptions; but if that memorandum of exceptions was to be regarded as a statement on appeal, he should have been so notified by the instrument itself, and if he then failed to present his amendments, he could not complain.

As we have already stated, we can see no good reason or authority for regarding this instrument, designated "Memorandum of Exceptions," in any different light from what it was regarded by the appellant herein and by the trial court prior to the making of the order denying appellant's motion for a new trial. To serve notice upon a party litigant by the specific terms of an instrument that the instrument itself, as in this case, is to be regarded as a memorandum of exceptions in the court below, and, later, when the instrument is brought to this court, then for the first time to declare that the instrument should have an entirely different significance, would be to not only depart from the specific provisions of the statute providing procedure in matters of appeal, but would be to work an injustice upon the party who might be affected thereby. In our judgment, a party is estopped, by his own position assumed in the court below, from taking a contrary position here, where certain rights of the opposing parties have thereby been cut off without fault on their part. (*State v. Commissioners of Lander County*, 22 Nev. 75, 35 Pac. 300; 16 Cyc. 796, and cases there cited.) However reluctant we may be to dismiss an appeal, the jurisdiction of this court can only attach where there has been at least a substantial compliance with those specific provisions of the statute governing matters of appeal.

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In view of the fact that, in our judgment, there is no statement on appeal in this case and no bill of exceptions, it follows that there is nothing before this court for review.

Inasmuch as the appeal from the judgment was, by a former decision of this court, dismissed (*Ward v. Pittsburg Silver Peak Gold Mining Company, supra*), and there is nothing before this court to review on the appeal from the order denying a new trial, and there is no contention that the judgment roll contains errors, it follows that the order of the lower court in denying appellant's motion for a new trial should be affirmed.

It is so ordered.

## ON REHEARING

By the Court, MCCARRAN, J.:

On granting the petition for rehearing in this case, the court made the order:

"That appellant show, by the certificate of the trial judge or by affidavit, subject to counter affidavits upon the part of the respondent, whether the alleged bill of exceptions or memorandum of errors, as the case may be, was settled or allowed by the trial judge in the presence of plaintiff or his counsel, and, if not so settled in the presence of the plaintiff or his counsel, what notice of such settlement or allowance, if any, was given."

Pursuant to this order, appellant filed the certificate of the trial judge, which reads as follows:

"Be it remembered that, on the 26th day of January, A. D. 1914, at the hearing of the motion for a new trial, in the above-entitled cause, counsel for defendant presented to the court a memorandum of errors and exceptions on the hearing of said motion for a new trial, and which said memorandum of errors and exceptions are included in the judgment roll and are numbered 1 to 78, inclusive, the clerk's certificate being added thereto in addition to said pages, and that said memorandum of errors and exceptions were signed on said date on



the hearing of said motion for a new trial, and allowed by the court, but said memorandum of errors was never settled as a bill of exceptions under section 5343, but was presented to the court on the day of the hearing of the motion for a new trial, and after the court asking of counsel for the plaintiff if he had compared the memorandum of errors presented to the court, and the court then and there, at the time of the hearing of the motion for a new trial, allowed and settled said memorandum of errors or exceptions by signing them; that by affixing my signature I then and there intended to both allow and settle the memorandum of errors for the hearing of the motion for a new trial."

The record discloses that the only motion made before the trial court for a new trial was based on that instrument found in the record designated "Memorandum of Exceptions."

The record leading up to the filing of this instrument contains a number of stipulations and orders, each one of which is in the following language:

"Good cause appearing therefor, it is ordered by the court that defendant may have, up to and including the ..... day of....., 191...., within which to file and serve memorandum of such errors excepted to as it intends to rely on upon said motion for a new trial," etc.

On the 10th day of January, 1914, the respondent herein, by his attorneys, filed an instrument entitled "Notice of Motion," as follows:

"To Pittsburg Silver Peak Gold Mining Company, a Corporation, and to Samuel Platt and George Martinson, Esqs., Attorneys for the Above-Named Defendant:

"Please take notice that on Saturday, the 17th day of January, 1914, at the courthouse in the City of Reno, County of Washoe, State of Nevada, at the hour of 10 o'clock a. m., or as soon thereafter as counsel can be heard, the above-named plaintiff will move the above-entitled court to strike from the files of said court a certain notice of intention to move for a new trial, heretofore filed by the above-named defendant in the

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above-entitled action, and a certain memorandum of errors filed in the office of said clerk of the above-named defendant, on or about the 31st day of October, 1913; and to rescind and set aside the order of the above-entitled court, granting said defendant a stay of execution upon the judgment heretofore entered in the above-entitled action. Said motion will be based upon all the records and files of the above-entitled court.

“Dated this 10th day of January, 1914.

“Dixon and Miller, Attorneys for Plaintiff.”

As appears from the record, the motion for a new trial was argued orally before the court by the respective parties, and at the close of the argument was presented to the court for its decision and findings. On the 26th day of January, 1914, the court rendered its decision on the motion for a new trial, denying the motion. Thereafter, and on the 9th day of February, 1914, appellant filed its notice of appeal from the judgment and order denying motion for a new trial, as follows:

“You, and each of you, will please take notice, that the defendant in the above-entitled action hereby appeals to the Supreme Court of the State of Nevada from the judgment therein entered in said district court on the 24th day of May, 1913, in favor of the plaintiff in said action and against said defendant, and from the whole thereof, and also from the order denying said defendant’s motion for a new trial made and entered in the minutes of said court on the 26th day of January, 1914.”

As stated in our former opinion, there are two methods prescribed by the statute by which an appeal may be brought to this court: The one is by statement on appeal, as prescribed by section 389 of the civil practice act (Rev. Laws, 5331); the other is by bill of exceptions, as prescribed by section 401 of the civil practice act (Rev. Laws, 5343). It is the contention of appellant here that that certain instrument in the record entitled “Memorandum of Exceptions” was, and is, in fact, a

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bill of exceptions as contemplated by section 401 of the civil practice act. It is a well-settled rule, which may be supported by any number of authorities, that an instrument cannot serve a purpose in one court or judicial proceeding different from and inconsistent with its function and purpose in another court or proceeding. (16 Cyc. 796, and cases there cited.) Every stipulation extending time, every order extending time, before the presentation of this instrument to the trial court, designated the instrument to be filed and served as a "memorandum of such errors excepted to as it [the defendant] intends to rely on upon said motion for a new trial."

Respondent's notice of motion to strike the memorandum of errors filed by appellant January 10, 1914, prior to the hearing on motion for new trial, was, according to the minutes, considered and determined by the trial court at the same time at which it heard and considered and determined appellant's motion for a new trial. It was pursuant to the order of the trial court denying respondent's motion to strike the memorandum of errors from the files that the court placed his signature on the instrument under the words:

"The within and above exceptions, and each and all of them, are hereby and herewith allowed. Dated....., 1913."

All the way through the affidavit of counsel for appellant, filed pursuant to the order for diminution of the record, we find that he uses the terms "bill of exceptions" and "memorandum of errors" interchangeably. For instance, he says:

"Affiant further states that during said proceedings on said day (referring to the day on which the motion for a new trial was heard), and immediately after affiant announced to the court that he would like to have the court allow and settle the bill of exceptions or memorandum of errors, affiant handed the bill of exceptions, or memorandum of errors, to Hon. Thomas F. Moran, the then presiding judge in said cause, for

the signature of the said judge as to the allowance and settlement of said bill of exceptions or memorandum of errors and the date thereof; that affiant had theretofore prepared a form of allowance and a separate form for the settlement of said bill of exceptions or memorandum of errors, both of which were attached to said bill and memorandum, and left a blank line under each of said forms for the signature of said district judge; that said district judge signed his signature on the blank line immediately beneath the form for the allowance of said bill or memorandum, but did not insert the date thereof and did not sign upon the blank line immediately following the form for the settlement of said bill or memorandum."

Under our code of civil procedure, providing for new trials and appeals, the terms "bill of exceptions" and "memorandum of errors" are not used, nor intended to be used, interchangeably. The instrument known as a "memorandum of exceptions," provided for by section 5322, Revised Laws, has its place in the proceedings on motion for a new trial; the instrument designated "bill of exceptions," as provided for in section 5343, Revised Laws, performs an entirely different function, and does not belong to the proceedings on motion for a new trial before the trial court, but is made a distinct method of bringing an appeal to this court. A memorandum of exceptions is provided for by statute to have its place in furtherance of a motion for a new trial; a bill of exceptions is provided for by the statute solely as a method of appeal. The function of the former is to draw to the attention of the trial court errors committed by that court during the course of the procedure; the function of the latter is to draw to the attention of the supreme court errors committed by the trial court during the course of the procedure. Not only is it true that the instrument here sought by appellant to have declared a bill of exceptions was entitled a "Memorandum of Exceptions," but it was so

regarded by the learned counsel for appellant in the court below, for it was on this memorandum of exceptions that the motion for a new trial was argued. If counsel for appellant had regarded the instrument which he had entitled "Memorandum of Exceptions" as being a bill of exceptions, no motion for a new trial or proceedings thereunder were necessary or provided for by statute. (Rev. Laws, 5334.)

In the case of *Elder v. Frevert*, 18 Nev. 279, 3 Pac. 237, this court held that where the statement on motion for a new trial also purported to be a statement on appeal, and was so treated in the orders extending time for filing a settlement made by the district court, and was filed within the time required by statute for a statement on appeal, it should be considered as a statement on appeal by this court. The very reverse of these conditions is presented by the case at bar. The instrument in question was entitled "Memorandum of Exceptions." The appellant in the court below regarded the instrument as being a memorandum of exceptions, and filed the same, and used it on motion for a new trial only. The certificate of the trial judge negatives the idea that it was used or signed as a bill of exceptions under section 5343, Revised Laws.

In the affidavit made by appellant's counsel, it is again made apparent that the instrument entitled "Memorandum of Exceptions" was, by counsel, used and relied upon in the lower court in furtherance of his motion for a new trial, and not as a bill of exceptions. He says:

"Affiant further states the fact to be that as to the remaining assignments of error set forth in the memorandum of errors or bill of exceptions, he in the main directly called the court's attention to them, and argued as fully as possible affiant's reason for urging them as separate grounds for the motion for a new trial."

As appears from the notice, the appeal is taken: First, from the final judgment; and, second, from the

order of the trial court denying defendant's motion for a new trial. The appeal from the judgment has been, by order of this court, dismissed. (*Ward v. Pittsburg Silver Peak Gold Mining Co.*, 37 Nev. 472.) The only appeal now before this court is the appeal from the order denying appellant's motion for a new trial. It is not the contention of appellant that the instrument entitled "Memorandum of Exceptions" is a statement on appeal; indeed, this contention, if made, could not be maintained, inasmuch as it does not, in any wise, comply with the provisions of the statute in that respect. Section 5332, Revised Laws, provides:

"When the appeal is taken both from the judgment and from an order denying a motion for a new trial, there shall be but one statement for both such appeals, which shall embody all errors relied on upon the appeal both from the judgment and from such order, and the time for filing and serving the proposed statement for both such appeals, and also the time for filing and serving the proposed statement on appeal from an order granting a motion for a new trial, shall be the same as the time provided for filing and serving the proposed statement on appeal from the order. The statement on appeal from an order granting or denying a motion for a new trial may contain so much of the evidence admitted or offered, exceptions taken, or proceedings had upon the trial or before or after the trial, as may be necessary to explain the particular errors specified and which were considered or presented upon the hearing of the motion for a new trial."

The appellant in the case at bar moved for a new trial, and based the motion upon the memorandum of exceptions filed. Appellant thereafter gave notice of appeal from the order of the trial court denying motion for a new trial. They came to this court without statement on appeal and without a bill of exceptions. For this court to say that a memorandum of exceptions as provided for by one section of the statute shall take the place of a bill of exceptions as provided for by another

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Norcross, C. J., dissenting

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section of the statute, and that the memorandum of exceptions alone shall cause this court to review the action of the trial court in denying a motion for a new trial, made long subsequent to the filing of the memorandum of exceptions, would be judicial legislation most flagrant.

1, 2. We are mindful of that section of our code (Rev. Laws, 5358) which provides

" \* \* \* An appeal shall not be dismissed for any irregularity not affecting the jurisdiction of the court to hear and determine the appeal or affecting the substantial rights of the parties and where any defect or irregularity can be cured by an amendment," etc.

The matter with which we are confronted in the case at bar is one of jurisdiction. As has been stated by this court in numerous decisions, the right of appeal is one regulated by statute; and, where there is a failure on the part of the appellant to at least substantially comply with the provisions of the statute, this court can do naught else than dismiss the matter.

The judgment of the lower court and the order denying appellant's motion for a new trial are affirmed.

It is so ordered.

COLEMAN, J.: I concur.

NORCROSS, C. J., dissenting:

While the question is not altogether free from doubt, nevertheless, when a liberal construction is applied to the provisions of the statute governing appeals (Rev. Laws, 5358), the facts disclosed by the certificate of the trial judge and the affidavits of respective counsel, filed in pursuance of the order for diminution of the record, will justify, in my judgment, a holding that the paper denominated a "Memorandum of Errors," and filed and served as such under Rev. Laws, 5322, may also be regarded as a bill of exceptions under Rev. Laws, 5343.

Counsel for defendant and appellant in this case,

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Norcross, C. J., dissenting

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instead of filing and serving a mere memorandum of errors, and relying upon the minutes of the court and the reporter's notes to support the same, obtained numerous extensions of time for the preparation and service of such memorandum until the reporter could make a transcript of the testimony, whereupon he prepared a document of seventy-eight typewritten pages, setting out at length the proceedings of the court relating to each ruling excepted to with reference to the pages of the transcript of the reporter's notes of the proceedings. In both form and substance it was a proposed bill of exceptions, and it contained a blank form for the judge's allowance.

It appears from the reporter's notes of the proceedings that upon the day of the hearing of the motion for a new trial, and just prior to the presentation of such motion, counsel for defendant informed the court that no amendments had been filed to "this bill of exceptions," and requested the judge to "allow and settle the bill of exceptions," to which request counsel for plaintiff interposed no objection, but merely stated, "I have never made any amendments, any memorandum of errors, Mr. Platt is having filed." Whereupon the judge signed the appended certificate, "The within and above exceptions, and each and all of them, are hereby and herewith allowed."

This brings us to a consideration of the question whether we now have in fact and in law a bill of exceptions within the provisions of section 401 of the practice act (Rev. Laws, 5343). In my judgment, there has been a substantial compliance with the provisions of the section. In form and substance a proposed bill of exceptions, embodying "sufficient facts to show the point of pertinency of the exceptions taken," was presented to the judge "during the progress of the cause, \* \* \* after judgment" in the presence of the attorney for the opposing party, and the same was signed



by the judge, allowing each and all of the exceptions thus embodied. The statute makes such bill of exceptions "a part of the record," and gives to an aggrieved party a right of appeal, not only from the judgment, but "any appealable order without further statement."

The fact that the certificate of the trial judge, recently filed in pursuance of the order for diminution of the record, recites that "said memorandum of errors was never settled as a bill of exceptions under section 5343" is, I think, immaterial. (37 Nev. 470, 472, 143 Pac. 119.) What purpose the judge may have had in mind could not affect the fact that he did allow the exceptions. He could not have intended to allow and settle this memorandum of errors "for the hearing of the motion for a new trial" without intending to "sign the same as the truth of the case may be." For the purposes of the motion for a new trial no such settlement or signing of the same by the judge was required.

The case of *Peterson v. Pittsburg Silver Peak G. M. Co.*, 37 Nev. 117, 140 Pac. 519, is, I think, conclusive upon the merits of the case.

#### ON APPLICATION TO FILE PETITION FOR SECOND REHEARING

By the Court, MCCARRAN, J.:

Since the rendition and filing of the opinion of this court on rehearing in the above-entitled case, an application has been made by appellant to be permitted to file a petition for second rehearing, and we are confronted with the question as to whether appellant is entitled to file such petition as a matter of right.

In the case of *Trench v. Strong*, 4 Nev. 87, this court held that it would be a mischievous practice to sanction the filing of a second petition for rehearing, and that the same should not be permitted except to correct a palpable error and grievous wrong.

Counsel for the appellant urges, in view of the fact that its first petition for rehearing was granted and that an opinion was written and filed by this court on that petition for rehearing, that therefore it should be permitted to file a second petition for rehearing based on the opinion of this court.

In the case of *Brandon v. West*, 29 Nev. 141, this court forcibly asserted the rule that a second application for the rehearing of a cause by the same party, after his petition for rehearing has been denied, will not be entertained. If there is reason for this rule where a petition has been denied, and, in our judgment, the reason is abundant, then, as we view it, there is equal, if not more, reason for the rule applying where a first petition for rehearing has been granted and all the matters therein set up have been considered by the court.

As asserted by this court in the case of *Brandon v. West*, *supra*, the court undoubtedly has the right to correct clerical mistakes or some error apparent on the record, such as might occur by inadvertence, oversight, or mistake; but such is not the case here, nor is it within the contention of appellant.

The granting of a petition for a second rehearing not based upon clerical mistake or apparent, palpable, injurious error is so liable to open the door to interminable proceedings that the rule asserted by this court in *Brandon v. West*, *supra*, should not be relaxed or modified.

Supporting the rule asserted by this court in the case of *Brandon v. West*, *supra*, are the more recent cases cited in 1913 Annotations of Cyc., page 294, to wit: *Laathe v. Thomas*, 233 Ill. 430, 84 N. E. 481; *Lavert v. Berthelot*, 127 La. 1004, 54 South. 329; *Nelson v. Hunter*, 145 N. C. 334, 59 S. E. 116.

In the case of *Marion Light and Heating Co. v. Vermillion*, 100 N. E. 100, the Appellate Court of Indiana, in a matter quite analogous to that presented here, held that where there was no statute or rule of practice

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Argument for Appellant

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or rule of court authorizing the same party in the same case to file more than one petition for rehearing; the overruling of the first petition for a rehearing exhausted the appellant's remedy in that court.

We are referred to the case of *Roth et al. v. Murray*, 141 S. W. 515. This case, however, cannot, as we view it, be considered as supporting the contention of appellant herein. The second motion for rehearing in that case was based upon errors in matters decided in the second opinion which were different from those decided in the first opinion. The reason, as well as the matter presented there, was such as differentiate that case from the matter at bar.

The petition will not be entertained.

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[No. 2176]

PACIFIC LIVESTOCK COMPANY (A CORPORATION),  
APPELLANT, v. MASON VALLEY MINES COM-  
PANY (A CORPORATION), RESPONDENT.

[153 Pac. 431]

1. APPEAL AND ERROR—"MOOT CASE"—DISMISSAL.

Where, pending appeal from judgment sustaining demurrer to the complaint in an action to enjoin a nuisance, defendant built its plant and operated it for three years, without any perceptible harm to plaintiff's lands, the appeal would be dismissed as embodying a "moot case," one seeking to determine an abstract question which does not rest upon existing facts or rights, since the cause of action of plaintiff's complaint, if any was alleged, was based upon a threatened injury to its lands from proposed action which did not in fact follow such action.

APPEAL from the Eighth Judicial District Court, Lyon County; *T. C. Hart*, Judge.

Action by the Pacific Livestock Company against the Mason Valley Mines Company. Judgment for defendant, and plaintiff appeals. **Appeal dismissed.**

*Edward F. Treadwell*, for Appellant:

Public-service corporations are liable for nuisances created in the operation of their business. (*Louisville-*

## Argument for Respondent

*Nashville Terminal Co. v. Lellyette*, 1 L. R. A. n. s. 49; *B. & P. Ry. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739; *Sammons v. Gloversville*, 175 N. Y. 346, 67 N. E. 622; *Johnston v. Providence & S. R. Co.*, 69 N. Y. Supp. 193; *Reighard v. Flynn*, 189 Pa. 355, 43 L. R. A. 502.)

A public-service corporation is not exempted from liability if it negligently or carelessly permits noxious and poisonous fumes to be discharged from its property onto that of its neighbors. (*Mandelbaum v. Russell*, 4 Nev. 551.)

Equity will restrain a threatened nuisance where the nuisance is actually imminent and where such nuisance will do irreparable damage to property or seriously menace life or health, and a demurrer will not lie to a complaint alleging such a threatened nuisance. (*State of Missouri v. State of Illinois*, 108 U. S. 208, 45 L. Ed. 497; 29 Cyc. 1222; *Wahle v. Reinbach*, 76 Ill. 322, 326; *Romano v. Birmingham Ry. Co.*, 62 South. 677; *Pierce v. Gibson Co.*, 64 S. W. 33; *Miley v. A'Hearn*, 18 S. W. 529; *Brew v. Van Deman*, 53 Tenn. 433, 440; *Eckels v. Weibley*, 81 Atl. 45; *Aldrich v. Howard*, 7 R. I. 87; *Wier's Appeal*, 74 Pa. St. 230; *Attorney-General v. Steward*, 21 N. J. Eq. 340; *Vaughn v. Law*, 20 Tenn. 123.)

*Brown & Belford*, for Respondent:

The public interest in the encouragement and protection of the mining industry of Nevada is so great that no person may prevent its prosecution, or secure its abatement, any more than one can abate the public interest in the mining industry, and for whatever damage may be directly inflicted the remedy of compensation alone is provided, and this remedy is due process of law. The right to engage in any occupation, or to prosecute a business which is a public use, or in which the public has an interest, carries with it, as an inseparable incident thereof, the further consequential right to such privileges as may be necessary for carrying on the occupation or business in accordance with the usual methods and means pertaining to it. The right itself being given, all things

## Opinion of the Court—NORCROSS, C. J.

necessary to its exercise or enjoyment go with it. (*Fiske v. Framington*, 12 Pick. 30; *London Railroad Co. v. Truman*, 1 App. Cas. 45; *Brown v. Humphrey*, 109 N. W. 714-717; *Hauck v. Pipe Line Co.*, 26 Atl. 644; *Vogt v. City*, 110 N. W. 603.)

What the legislature declares to be lawful cannot be a nuisance, unless through negligence and want of due care. (*Randall v. Jacksonville St. Ry. Co.*, 19 Fed. 409; *State v. Louisville & N. Ry. Co.*, 86 Ind. 114; *Chope v. Detroit Co.*, 37 Mich. 195; *Gray v. Patterson*, 60 N. J. Eq. 385; *Crofford v. Alabama Ry. Co.*, 48 South. 366; *Southern Ry. Co. v. Albes*, 45 South. 234; *Simonds v. Telephone Co.*, 72 Atl. 175; *Farrell v. Old Town*, 67 Me. 72; *Winship v. Enfeld*, 42 N. H. 197; *Steiner v. Phila T. Co.*, 19 Atl. 491; *A. T. & S. F. R. R. Co. v. Armstrong*, 80 Pac. 978.)

The neglect of a person to perform a legal duty which he owes to another is never actionable under any circumstances until such neglect as the proximate cause thereof results in damage to the person to whom the legal duty is due. (3 Suth. Code Pl., sec. 4277.)

By the Court, NORCROSS, C. J.:

This is an appeal from a judgment following an order sustaining a demurrer to the plaintiff's complaint. The complaint is in the form of a bill in equity to enjoin an alleged threatened injury to plaintiff's agricultural land by poisonous fumes, which it is alleged will be discharged from defendant's smelter. The demurrer was general, and upon the grounds that the complaint "does not state facts sufficient to constitute a cause of action" or "to entitle the plaintiff to the injunctive relief prayed for." The complaint, after alleging that plaintiff and defendant are corporations, the former organized under the laws of California, and the latter under the laws of Maine, and that plaintiff is the owner of a certain tract of agricultural and grazing land comprising about 20,000 acres and situate in Mason Valley and embraced within townships 13, 14, and 15 north, range 25 east, and sections 14 and 15 north, range 26 east, proceeds to allege in substance as follows: The ownership by the

defendant of certain other tracts of land in township 15 north, range 25 east, therein described, upon which it is building, and threatening to build, a smelter for the treatment of copper and other ores from the various mining centers of Nevada, including Tonopah, Goldfield, and Mason, and that upon the completion of the smelter it will be operated to smelt such ores as may be brought to it for that purpose. That the operation of the smelter will result in discharging into the atmosphere fumes containing sulphur dioxide and arsenious acid and other noxious gases and substances, which by the atmosphere will be carried to the property of the plaintiff, and by settling thereon will cause the vegetation to be damaged and destroyed. That the smelter is within three miles of a portion of the lands of the plaintiff and that the fumes will be carried 15 to 20 miles from the smelter and by reason of the destruction of vegetation will destroy the usefulness and value of the plaintiff's lands. That the defendant knows: (a) the character of the fumes to be discharged from its smelter; (b) that other smelters similarly constructed have killed the vegetation surrounding them for a distance of from 15 to 20 miles; (c) that a smelter so constructed and at such a place will discharge poisonous substance upon the plaintiff's lands and destroy their vegetation, to the great and inestimable damage of the plaintiff and of its lands. That the damage caused by the defendant by reason of the matters and things alleged in the bill of complaint will exceed the sum of \$200,000, and that plaintiff has no plain, speedy, or adequate remedy at law. The plaintiff then prays for the issuance of an injunction to restrain defendant from carrying on or operating its smelter or from smelting ores therein or proceeding with the work of the construction thereof; that said smelter and its operation be adjudged to be a nuisance to plaintiff's lands and that the operation thereof may be forever enjoined and restrained. There is also incorporated in the bill of complaint a prayer for an injunction *pendente lite* to restrain the further

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Opinion of the Court—NORCROSS, C. J.

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construction of the smelter. The complaint was filed December 13, 1911, and the demurrer December 23, 1911. The order sustaining the demurrer was filed January 2, 1915.

From the opinion of the trial judge, embodied in the transcript on appeal, we quote the following excerpt as expressing the views of the judge of the court below upon the law of the case:

"It does seem to me, therefore, that before the complaint in this action can be held to be good, allegations of damage having occurred — not problematical damage — must be averred. Undoubtedly defendant corporation would be liable to plaintiff if it, defendant, created a nuisance which injured plaintiff's property. But this condition does not exist here. That which the law authorizes is not a nuisance, and the complaint here does not in any wise charge, either that the plaintiff has been injured at all, nor that the defendant has committed any trespass or caused any injury."

The briefs of counsel, both for appellant and respondent, disclose legal contentions at variance with the views expressed by the learned trial judge. It is the contention of counsel for appellant that the court below did not go far enough, and should have held that allegations of threatened injury were sufficient to constitute a cause of action and to entitle plaintiff to equitable relief by way of injunction. Counsel for respondent contends that the judge's decision went too far in holding that there could be any liability for damage upon the part of defendant smelter company in the absence of negligence, no matter what injury it caused. The contention of counsel for defendant is substantially correctly stated in appellant's opening brief as follows:

"First — That in the State of Nevada mining and smelting have been declared a public use, and the paramount interest of the state, and the right to condemn private property, under the process of eminent domain has been granted in respect thereto.

"Second — That such a smelter may therefore be

established in the midst of the most highly developed agricultural section of the state, and there discharge in unlimited quantities sulphur dioxide and arsenious acids upon the adjacent lands, entirely destroying the same and all agricultural products thereon, and for such destruction the owner has no redress, either by way of damages or by way of injunction.”

It thus appears that this court is asked to decide a question of law of the greatest importance, not only to the parties to this controversy, but to the entire people of this state. The two leading industries of the state—agriculture and stock-raising on the one hand and the mining industry on the other—are tremendously interested in the sustaining of either of the legal contentions presented. If the contention of counsel for appellant is determined to be the law, owners of agricultural land which might be injured by poisonous fumes and gases emitted from a smelter may enjoin the threatened operation of a smelter in absence of the smelter company condemning the land alleged to be affected and paying to the owners the value thereof. Upon the other hand, if the contention of counsel for respondent is sustained in its entirety, a smelter may be placed anywhere that will best suit the convenience of its owners, and its fumes may completely destroy the richest agricultural section of the state, and there is no remedy for persons thus injured either by injunction or by way of damages for loss sustained. Commenting at length upon the importance of the legal questions presented upon the face of the record, counsel for respondent, in part, says :

“The relief sought by the plaintiff will, at once, invoke the most earnest attention of the court because the importance of its granting, or refusal, is fraught with consequences whose far-reaching effect it is impossible to exaggerate. If the defendant were alone involved, or if the results of the decision in this case were to be confined to its immediate parties, we might approach the solution of the questions to be determined with a feeling of confidence, untempered by considerations of



the great public interests actually affected. The vision of the court, however, must extend beyond the lands and smelters, which are here in question, to those other lands and smelters which may be found to lie at the very foundation of the prosperity of a great people. The litigation embraces, not only the immense holdings of Miller and Lux and the mines and smelters of Mason Valley, but its ramifications include the principles which may hereafter be found to govern and control the industrial activities of the state."

Ought this court to determine questions of the importance above indicated unless there is presented to the court a controversy between the parties, based upon facts actually existing or alleged to exist? This and other courts have frequently refused to determine questions presented in purely moot cases. Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events. (*Wedekind v. Bell*, 26 Nev. 395, 69 Pac. 612, 99 Am. St. Rep. 704.)

"A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights." (*Adams v. Union R. Co.*, 21 R. I. 134, 140, 42 Atl. 515, 44 L. R. A. 273.)

See, also, *Duggan v. City of Emporia*, 84 Kan. 429, 114 Pac. 235, 239, Ann. Cas. 1912A, 719; *State v. Dolley*, 82 Kan. 533, 108 Pac. 846; *Ex Parte Steele* (D. C.) 162 Fed. 694, 701; 27 Cyc. 911.

We think there is nothing before the court at the present time but a moot case. The complaint in question was filed at the time of or prior to the construction of respondent's smelter. The cause of action, if any was alleged (the controversy sought to be determined), was based upon a threatened injury to plaintiff's lands. Between the time of the institution of the suit and the decision upon demurrer, the smelter had been completed and had been in actual operation for a period of nearly three years. According to the briefs of respective counsel, and it was so conceded during the oral argument

of the case in this court, it was admitted in the court below, and has been so admitted in this court, that the actual operation of the smelter has occasioned no damage whatever to appellant. From the brief of counsel for respondent we quote:

“At the time the demurrer was sustained, the smelter had been in operation nearly three years. If any damage resulted from its operation, counsel had a golden opportunity to point out, in an amended complaint, just what damage the smelter had inflicted upon his land. He then had a splendid chance to allege what had occurred, instead of what would occur; a chance to show the actual effect of the smelter’s operations upon the land in question by actual results. In short, he was then in a position to allege facts which might constitute a cause of action, if he had one, instead of relying upon the choice collection of vague prophecies, recitals, and conclusions which are now before the court. But, in spite of actual experience, reinforced by definite knowledge of what the smelter had actually done, by its operations, which would show what damage, if any existed, counsel refused to amend or to set up a real cause of action, if he had one, but stood on his original complaint as to what would occur, but which evidently has not occurred.”

Counsel for appellant in his reply brief says:

“Counsel twits us with not amending our complaint by alleging damages since the commencement of the action. Would it not be more reasonable for the court to infer that none had occurred, and if the filing of this suit has prevented the anticipated damage it has accomplished for the time all it was designed to accomplish, and why should defendant seek to maintain a judgment based on the proposition that no such preventive suit can be maintained? If no damages have or shall accrue, we shall be quite as much pleased as defendant, but we do object to a judgment based on the ground that a suit to prevent an injury will not lie, and sought to be supported by the argument that, even

## Opinion of the Court—Norcross, C. J.

if the damage did occur, it would be 'consequential' and *damnum absque injuria*."

To constitute a real controversy requires something more substantial than a mere objection to a judgment because based on the ground that a suit to prevent an injury will not lie, or that the judgment is sought to be supported by an argument of opposing counsel which counsel for appellant deems fallacious. The mere fact that the court below held, whether rightly or erroneously, that to constitute a cause of action there must be an allegation of existing damage does not present a question affecting any existing rights of appellant, when it is conceded that the smelter is now a reality and has been in actual operation for a period of nearly three years without occasioning any damage whatever. It is conceded that plaintiff cannot establish the allegations of the complaint; that the allegations of threatened injury are completely overcome by the actual subsequent development of the real facts. Counsel for appellant, in effect, says that the defendant company may have so operated their smelter as not to produce the damaging fumes, by not smelting ores which would occasion them, and that this result may have been brought about by the bringing of this action. Counsel for appellant also expresses the hope that no injury will result in the future, and that this great industry may continue to develop the country without damage to his client's interests.

This presents no argument why the court should speculate upon what may develop as a result of future operations in the fact of the admission that past operations have occasioned no injury.

It may be that actual conditions may never arise requiring this court to apply the law to facts such as are alleged in this complaint. It is devoutly to be hoped that they never will. It will be time enough, however, to determine such a momentous question when an actual controversy arises between the parties to the present suit or other parties.

We are unable to see where appellant could forfeit any right of action which might subsequently accrue by reason of a dismissal of the present appeal for want of an actual controversy. Counsel has cited cases in support of the view that if a landowner stands by and permits a smelter to operate for a long number of years without objection and without bringing suit, he loses his right to later enjoin the operation thereof. Whatever, if anything, there may be in this view, it could have no application to appellant, for the appellant company instituted its suit promptly, and cannot be subject to a charge of laches unless such charge of laches was based upon conduct subsequent to the occurring of a cause of action in the future.

While we are convinced this appeal should be dismissed for the reason it presents only a moot question, we feel we owe it to distinguished counsel upon both sides of this case to say that, in the voluminous and exhaustive printed briefs filed in this case, they have made a most valuable contribution to the law upon a question which has vexed the courts of several states and has presented to the federal courts most serious questions for determination. Should the necessity ever arise for this court to determine the controversial questions sought to be presented in this case, the briefs of respective counsel may be resorted to as embodying a learned and comprehensive consideration of that which may be regarded as one of the most, if not the most, important subject a court of last resort in this state can consider.

For the reasons given, the appeal should be, and is, dismissed.

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## Argument for Appellant

[No. 2193]

STATE OF NEVADA, RESPONDENT, v. FRANK  
BLAHA, APPELLANT.

[154 Pac. 78]

## 1. CRIMINAL LAW—APPEAL—PRESENTATION—ADMISSION OF CONFESSION.

An assignment of error complaining of the admission of a confession could not be considered where the transcript of the testimony disclosed no objection, though appellant's counsel stated to the court that objections to the admissibility of the confession had been made and apparently omitted from the transcript through inadvertence. In the absence of proof that such was the case and a request made for diminution of the record.

## 2. CRIMINAL LAW—HARMLESS ERROR—EVIDENCE—STATEMENTS BY ACCUSED.

Error, if any, in permitting witnesses to testify to conclusions relative to statements made by accused to officers while he was under arrest, was harmless, where the whole conversation between defendant and the officers was detailed, and it clearly appeared that the statements were freely and voluntarily made.

## 3. CRIMINAL LAW—SELF-SERVING STATEMENTS—FOUNDATION FOR ADMISSION—NECESSITY.

In a prosecution for burglary, it was not necessary that a foundation be laid for the admission of defendant's statements that he purchased the stolen jewelry in certain cities.

## 4. CRIMINAL LAW—INSTRUCTIONS—REQUEST—FALSE TESTIMONY.

Failure to instruct on the maxim, "*Falsus in uno, falsus in omnibus*," was not error, where accused made no request for such instructions.

## 5. CRIMINAL LAW—INSTRUCTIONS—TESTIMONY OF ACCUSED.

In view of Rev. Laws. 7160, as amended by Stats. 1915, c. 157, providing that no special instructions shall be given relating exclusively to the testimony of defendant, the court properly refused to instruct that defendant had testified in his own behalf, and that this was his legal right, and that the jury were not permitted to reject his testimony merely because he was the accused.

APPEAL from Second Judicial District Court, Washoe County; *Thomas F. Moran*, Judge.

Frank Blaha was convicted of burglary of the first degree, and appeals. **Affirmed.**

*W. H. Virden*, for Appellant:

If objection be made, the voluntary character of an alleged confession must be determined by the court

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Argument for Respondent

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before the confession can properly go to the jury. It is error for the court to refuse to first rule as to whether the confession was or was not voluntary. (Am. & Eng. Ency. Law, vol. 6, 2d ed. p. 554; *People v. Him Ti*, 32 Cal. 64; *People v. Ah How*, 34 Cal. 218.)

The court should have instructed the jury that a witness shown to have sworn falsely in one detail may be considered as unworthy of belief as to all the rest of his evidence. (Ency. Law & Pr., vol. 10, p. 449.)

It is usual in criminal cases to give instructions, both for the state and for the defendant, which apply abstract principles of law to both the state's and the defendant's theory of the case. To refuse such instructions is error. (*State v. Hennessy*, 29 Nev. 320.)

*Geo. B. Thatcher*, Attorney-General, for Respondent:

Defendant's statement was not a confession. It was an admission of guilt, in the nature of a declaration, which, if true, tended to show his innocence. Such statements are admissible without preliminary proof that they were freely and voluntarily made. "Usually the proof that no influences were brought to bear is made by verbal answers of the party or parties to whom the confession is made." (*Mose v. State*, 36 Ala. 211; *Wyatt v. State*, 25 Ala. 9; *Gallagher v. State*, 40 Tex. Crim. 296; *State v. Williams*, 31 Nev. 360, 375.)

Error in admitting the evidence of one witness of a confession by an accused is harmless where the same confession is proved by other witnesses. (*State v. Buster*, 23 Nev. 346, 348.) Declarations made by a defendant to the constable who arrested him, not amounting to a confession or acknowledgment of guilt, are admissible in evidence without preliminary proof of their voluntary character, notwithstanding they may, when connected with the facts, tend to establish his guilt. (*People v. Hickman*, 113 Cal. 80; *Wilson v. U. S.*, 162 U. S. 613; *People v. Gates*, 13 Wend. 311; *People v. Ashmead*, 118 Cal. 508; Ency. of Ev., vol. 3, pp. 322, 323.)

The court having finally decided that the confession was admissible, any error of having heard the matter

preliminarily in the presence of the jury was cured. (*Kirk v. Territory*, 10 Okl. 46.)

If appellant desired an instruction in accordance with the legal maxim, *Falsus in uno, falsus in omnibus*, he should have prepared and presented it to the court. (*State v. McLane*, 15 Nev. 345; *State v. Smith*, 10 Nev. 106, 122; *State v. Davis*, 14 Nev. 407, 414; *State v. St. Clair*, 16 Nev. 207; *State v. Hing*, 16 Nev. 307.)

By the Court, NORCROSS, C. J.:

1-3. Appellant was convicted of the crime of burglary of the first degree, and appeals. Evidence was introduced establishing the fact that a burglary was committed on the night of the 25th day of July, 1915, in the city of Reno, and certain jewelry taken from a trunk stored in a building upon the property of one R. T. Harwell. Upon the afternoon of the day following the burglary appellant was arrested by a police officer of the city of Reno while in the act of attempting to dispose of the stolen jewelry, and was at once taken to the police station. The arresting officer and another member of the city police force, over the objection of counsel for the defendant, were permitted to testify to statements made by the defendant to the effect that he purchased a ring, which was part of the stolen jewelry, in the city of Chicago, and a necklace, which was also a part of the stolen jewelry, in the city of Seattle. Shortly subsequent to making these statements the defendant made a confession to the chief of police that he had committed the burglary. Error is assigned in the admission of the statements and confession upon the ground that no proper foundation had been laid. The transcript of the testimony discloses no objection whatever to the admission of the confession. Counsel for appellant advises the court that objections to the admissibility of the confession because a proper foundation had not been laid may have been inadvertently omitted in transcribing the record. No proof appears that this is the case, and no request

has been made for diminution of the record; hence the suggestion of counsel for appellant cannot be considered. The objection which counsel for appellant asserts was, in fact, made, even if embodied in the record, would not justify this court in holding the same to be substantial error. Assuming that the same objection was made to the testimony of the chief of police as that made to the testimony of the two other officers, the error, if any, amounts simply to the sustaining of an objection to questions propounded to the witnesses whether any inducements, threats, or offers of reward were made to procure the statements or confession. Even assuming that the court may have committed technical error in permitting the witnesses to testify to conclusions, it also appears that the whole conversation between the defendant and the officers was detailed, and from all of the facts and circumstances there was no room for serious question that the statements and confession were made otherwise than freely and voluntarily. Besides, it was not necessary to lay any foundation for the admission of the statements made by the defendant as to how he came into possession of the jewelry in question.

"Self-serving statements made by or for the accused out of court, explaining suspicious circumstances, may be proved against him, and their falsity may then be shown. The fact of their falsity admits them as indicating an attempt to explain away incriminating circumstances by falsehoods." (12 Cyc. 429.)

Error is assigned in the refusal to give certain instructions requested by defendant. With the exception of one requested instruction, hereafter to be referred to, the instructions requested and refused, so far as they were material, were substantially covered by other instructions given by the court.

4. Error is assigned in the failure of the court to give an instruction of its own motion upon the maxim, "*Falsus in uno, falsus in omnibus.*" If counsel for defendant was of the opinion that an instruction of



this kind was material, it was incumbent upon him to request the same.

5. The following instruction requested by counsel for the defendant was refused:

"The defendant has offered himself as a witness, and has testified in his own behalf. This is his legal right, and you are not permitted under the law to discredit or reject his testimony simply on the ground that he is the accused, and on trial on a criminal charge."

Section 310 of the criminal practice act (Rev. Laws, 7160), as amended by the legislature of 1915 (Stats. 1915, c. 157), provides:

"In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given his testimony being left solely to the jury, under the instructions of the court; *provided*, that no special instruction shall be given relating exclusively to the testimony of the defendant, or particularly directing the attention of the jury to the defendant's testimony."

It clearly appears from the reading of the section as amended that purpose of the statute is to forbid the giving of instructions with direct reference to the testimony of the defendant. The court is permitted to, and did in this case, give general instructions applicable to all witnesses. The purpose of the amended statute was, doubtless, to obviate in the future the giving of an instruction heretofore frequently given in criminal cases and sustained by a number of decisions of this court, and reading as follows:

"The defendant has offered himself as a witness on his own behalf, and in considering the weight and effect to be given his evidence, in addition to noticing his manner and the probability of his statements taken in connection with the evidence in the cause, you should consider his relation and situation under which he gives his testimony, the consequences to him relating from

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Points decided

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the results of this trial, and all the inducements and temptation which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which his evidence is entitled; if convincing, and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it."

The foregoing instruction, while approved by the earlier decisions of the courts of a number of states, has in recent years been severely criticised. The Supreme Court of California, after repeatedly holding this instruction not to be error, later admonished trial courts not to give it, and finally reversed cases where the instruction had been given.

From a reading of the transcript in this case we are unable to see how the jury could have reached any other verdict than the one returned. The defendant was deprived of no substantial right, and no substantial error appears.

Judgment affirmed.

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[No. 2064]

WILLIAM H. EARL, C. E. FORD, WILLIAM ROSS, M. COOPER, DAVE MEIKLE, WILLIAM FROST, C. E. EVANS, AND WILLIAM GALLAGHER, RESPONDENTS, v. WILLIAM H. MORRISON, JOSEPH NICHOLS, AND WESTERN PACIFIC RAILWAY COMPANY (A CORPORATION), APPELLANTS.

[154 Pac. 75]

1. PUBLIC LANDS—CHARACTER—DETERMINATION BY LAND OFFICE.

The determination by the federal land department of the character of public lands is conclusive, except in certain direct proceedings to set aside a patent for fraud, imposition, mistake, or the like.

2. APPEAL AND ERROR—MATTERS OUTSIDE OF RECORD.

The court on appeal from a judgment based on findings that land is mineral may consider a patent since issued conclusive that the land is not mineral.

APPEAL from Second Judicial District Court, Washoe County; *Thomas F. Moran*, Judge.

Suit by William H. Earl and others against William

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Opinion of the Court—Coleman, J.

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H. Morrison and others. Judgment for plaintiffs, and defendants appeal. **Remanded**, with directions.

*Cheney, Downer, Price & Hawkins*, for Appellants:

The complaint does not state a cause of action. It was impossible to ascertain with any certainty the particular portion of land in controversy. By pleading a specific claim to the property the allegations of ownership, right of possession, and possession, are referable to the title pleaded and are nullities standing alone. (*Gruwell v. Seybolt*, 82 Cal. 7.)

Only public mineral lands can be entered under the mining laws. (Lindley on Mines, sec. 112.) There is no evidence in the record sufficient to show that the land in controversy is mineral in character or contains valuable mineral deposits, or that a legal discovery was ever made thereon. Land to be mineral must be susceptible of profitable mining operations; it must be more valuable for mining than for any other purpose. (*Alford v. Barnum*, 45 Cal. 482; *Merrill v. Dixon*, 15 Nev. 401.) A mining location must be made in good faith. (*Chrisman v. Miller*, 197 U. S. 313, 49 L. Ed. 770.) The court exceeded its powers in passing upon the title to the property. (*Sloan v. U. S.*, 95 Fed. 193; *Savage v. Worsham*, 104 Fed. 18; *Humbard v. Avery*, 110 Fed. 465, affirmed in 194 U. S. 480; *Wanekros v. Cowan*, 108 Pac. 238; *Sims v. Morrison*, 100 N. W. 88.)

*J. B. Dixon*, for Respondents:

Where a naked appeal is taken from the judgment only, without a bill of exceptions or its substitute, the judgment roll only can be examined. (2 Ency. Pl. & Pr. 367.) Appellate courts will not review errors assigned affecting matters extrinsic to the record. Facts outside the record cannot be presented by affidavits or otherwise. (2 Ency. Pl. & Pr. 387.)

By the Court, COLEMAN, J.:

This is a suit to determine the right of possession to a certain portion of the public domain of the United States. Plaintiffs base their right of possession upon

an alleged location of a placer mining claim; while the defendants rely upon rights asserted pursuant to filings under scrip, claiming that the land is nonmineral in character. In the trial court evidence was introduced by the respective parties to sustain their contentions. Judgment was rendered in favor of the plaintiffs, and defendants have appealed. The only issue in the case below was as to the character of the land; that is, whether it was mineral or nonmineral.

After the case had been docketed in this court on appeal, defendants made a motion for a stay of proceedings pending the determination by the land department of the United States of the character of the land in question. The motion was granted. On November 2, 1915, appellants made a motion in open court that the judgment of the lower court be modified, and that judgment be rendered in favor of appellants, for the reason that since the granting of the stay of proceedings appellants had acquired title to the land under a patent issued by the United States government, which was exhibited in open court. Respondents' position is that such a procedure as that sought by appellants is unheard of and revolutionary, contending that the case must be disposed of here upon the record made in the lower court.

1. It is invariably held that the determination by the land department of the character of land is conclusive, except in certain direct proceedings to set aside a patent for fraud, imposition, mistake, and the like. In *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226, it is said:

"We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United

States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

In *Burfenning v. Chicago & St. Paul Ry.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175, Mr. Justice Brewer, speaking for the court, used the following language:

"It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions, is conclusive, and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reexamined. (*Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Smelting Company v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Steel v. Smelting Company*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039; *Heath v. Wallace*, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063; *McCormick v. Hayes*, 159 U. S. 332, 16 Sup. Ct. 37, 40 L. Ed. 171.)"

In *Gale v. Best*, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44, it is said:

"The rule is well settled by unanimous decisions of the Supreme Court of the United States that, when a law of Congress provides for the disposal and patenting of certain public lands upon the ascertainment of

certain facts, the proper officers of the land department of the general government have jurisdiction to inquire into and determine those facts; that the issuance of a patent is an official declaration that such facts have been found in favor of the patentee; and that in such a case the patent is conclusive in a court of law, and cannot be attacked collaterally. Of course, if the patent be void upon its face, or, if looking beyond the patent for a law upon which it is based, it is found that there is no law which authorizes such a patent under any state of facts, or that the particular tract named in the patent has been absolutely reserved from disposal, then the patent would be worthless and assailable from any quarter. For instance, if a certain section or a certain township described by legal subdivisions should be expressly and unconditionally reserved by Congress from disposal under any statute, a patent for any part of such tract would be void. But, if a large body of public lands be subjected to sale or other disposition under a law which has merely a general reservation of such parts of those lands as may be found to be of a particular character—such as swamp or mineral—then the land department has jurisdiction to determine the character of any part thereof, and a patent is conclusive evidence that such jurisdiction has been exercised. In such a case the patent could be attacked only by a direct proceeding, and by a person who connects himself directly with the title of the government.”

See, also, *Jameson v. James*, 155 Cal. 275, 100 Pac. 700; *Traphagen v. Kirk*, 30 Mont. 562, 77 Pac. 58; *United States v. Mackintosh*, 85 Fed. 333, 29 C. C. A. 176; *Southern Dev. Co. v. Endersen* (D. C.) 200 Fed. 272, 281.

The Supreme Court of Dakota, in *Forbes v. Driscoll*, 4 Dak. at page 359, 31 N. W. at page 645, after reviewing many cases in which it had been held that the findings of the land department of the United States as to the character of land are final, says:

“A contrary view of the law would bring the courts and land offices into constant collision. A decision of

the courts in advance would take from these officers the jurisdiction the law has given them to hear and determine 'all rights of preemption arising between different settlers.' It would bring into the courts for decision all claims and contests before the department, and the absurd result would be reached, as we are informed by briefs of counsel has in fact resulted in this case, to wit: That the plaintiff, Forbes, has judgment in the district court of the territory, awarding him the possession of the entire quarter-section, while the defendant Driscoll has the decision of the land department, entered since the trial of this case, awarding him the patent, and consequent right to possession, of the same premises. We have no doubt that the manifest intent of the statutes of the United States, as is so clearly expressed by the decisions of the supreme court, was to vest in the land department an exclusive jurisdiction of all questions relating to the sale and disposition of the public lands up to the time of the issue of the patent; and this court is therefore of the opinion that the district court erred in entering judgment upon such verdict for the possession of the entire quarter-section, ousting the defendant Driscoll from his possession and improvements made upon the vacant and unimproved portions of the land. It is not meant to be understood by this decision that an action for possession does not lie under section 650 of the code of civil procedure to protect the actual possession of the preemptor against an intruder, or that such action might not lie to recover, beyond the actual possession, the entire quarter-section as against a trespasser. This court contents itself with declaring that the judgment ousting the junior preemptor from his possession and improvements, obtained and made without trespass, is erroneous, and must be reversed."

2. Since the issuance of a patent by the government is a conclusive finding that the land in question is not mineral in character, except in certain direct proceedings, the question is: Can this court ignore the findings and judgment of the lower court? In *Ridge v.*

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*Manker*, 132 Fed. at page 601, 67 C. C. A. at page 598, Judge Hook uses the following language:

“An appellate court may avail itself of authentic evidence outside of the record before it of matters occurring since the decree of the trial court when such course is necessary to prevent a miscarriage of justice, to avoid a useless circuitry of proceeding, to preserve a jurisdiction lawfully acquired, or to protect itself from imposition or further prosecution of litigation where the controversy between the parties has been settled, or for other reasons has ceased to exist. (*Chamberlain v. Cleveland*, 1 Black, 419, 17 L. Ed. 93; *Lord v. Veazie*, 8 How. 251, 12 L. Ed. 1067; *Wood Paper Co. v. Heft*, 8 Wall. 333, 19 L. Ed. 379; *Board of Liquidation v. Railroad Co.*, 109 U. S. 221, 3 Sup. Ct. 144, 27 L. Ed. 916; *Dakota v. Glidden*, 113 U. S. 222, 5 Sup. Ct. 428, 28 L. Ed. 981; *Little v. Bowers*, 134 U. S. 547, 10 Sup. Ct. 620, 33 L. Ed. 1016; *Washington and Idaho Railroad Co. v. Cœur d'Alene R. & N. Co.*, 160 U. S. 101, 16 Sup. Ct. 239, 40 L. Ed. 355; *Bryar v. Campbell*, 177 U. S. 649, 20 Sup. Ct. 794, 44 L. Ed. 926.)”

The rule laid down in the opinion of Judge Hook appeals to us as being both reasonable and just. While we cannot try *de novo* the issues involved in the lower court, we think we can take cognizance of the issuance by the federal government of a patent (which is not denied) which is conclusive of the matter. If such were not the case, gross injustice might result in many instances, of which the case at bar is an example. In this controversy one tribunal has decided that the land in question is mineral, and has rendered judgment awarding possession of it to plaintiffs, while the tribunal established by the federal government for the purpose of determining just such questions as to its property has held to the contrary, and its determination is universally recognized as conclusive of the question. Plaintiffs' judgment is but an empty shell, and one which, in our opinion, can and should be set aside.

The sole question is: Shall this court, when confronted with the indisputable and unquestioned proof



that the government has determined that the land in question is nonmineral in character, affirm a judgment or even consider the case upon the record as made in the lower court? If we were to affirm the judgment of the lower court, it could be set aside in an independent proceeding. What, then, is the sense in considering this case upon the record made in the lower court? As shown by the cases cited by Judge Hook, appellate courts have, in a variety of situations, disposed of cases otherwise than upon the record brought up. It is no novel procedure. The situation here presented is similar to that which is brought to the attention of the court when, before determination on appeal, the issues involved are settled between the parties and there is no longer an existing controversy. When such a situation is brought to the attention of the court, the case in which it exists is always dismissed. (*Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815; *Wedekind v. Bell*, 26 Nev. 395, 69 Pac. 612, 99 Am. St. Rep. 704; *Pacific Livestock Co. v. Mason Valley Mines Co.*, 39 Nev. 105, 153 Pac. 431, recently decided by this court.) If a court can determine that a proceeding is a moot one, why may it not consider indisputable and undisputed evidence that the government of the United States has made a finding which is conclusive, not only upon the parties, but upon all courts?

In the case of *Goldstein v. Behrends*, 123 Fed. 399, 59 C. C. A. 203, which was an action to determine the right of possession to a portion of the public domain of Alaska, it is said:

"Conceding that the action was for the purpose of determining the right of possession, the controlling question was as to the mineral character of the land. This question was within the jurisdiction of the land department to determine, and, upon being submitted to that department in the proceedings for a patent, was determined adversely to the appellant by the secretary of the interior; that officer holding that the land was not mineral, and awarding the land to the town-site trustee. This decision is conclusive as to the character

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Points decided

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of the land, and disposes of the controlling question involved in this case. The appellee in possession of the land has acquired title to it under the town-site patent, and this action in support of his claim to have possession and receive that title has ceased to have a subject upon which a judgment of the court can operate. (*Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293.)"

It is the order of the court that the case be remanded, and that the trial court enter an order vacating the judgment and dismissing the action; the parties to pay their own costs in both courts.

*Per Curiam:*

Petition for rehearing denied.

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[No. 2182]

J. E. GASTON, RESPONDENT, v. MARY AVANSINO,  
AS ADMINISTRATRIX OF THE ESTATE OF LOUIS  
AVANSINO, DECEASED, MARY AVANSINO, LOUIS  
AVANSINO, AND LENA AVANSINO, APPELLANTS.

[154 Pac. 85]

1. EVIDENCE—"NEGATIVE TESTIMONY."

The testimony of one claiming a mechanic's lien for work performed upon a building that he worked on the building, that at the time he looked for a notice signed by the owner that he would not be responsible for the repairs, and that there was no such notice at any time while he was doing the work is not negative testimony such as may be disregarded in the face of positive testimony that the notice was posted.

2. APPEAL AND ERROR—SCOPE OF REVIEW—CONFLICTING TESTIMONY.

Where the testimony of the plaintiff on the trial of an action to foreclose a mechanic's lien was positive that a notice disclaiming liability for the work done was not posted, and the defendant's testimony was equally positive that it was posted, there was such a conflict in the testimony that the determination of the lower court would not be disturbed.

## Argument for Appellant

## 3. MECHANICS' LIENS—TIME FOR FILING.

Where the original contract for the alteration and repair of a building under which a mechanic's lien was sought to be foreclosed contemplated only certain repairs, but there was no time limit during which they should be done, and other and additional repairs were made at various times, continuing for a period of several months, a notice of mechanic's lien filed within six months of the completion of the last work of repair was filed in time; the contract being a continuing contract, although during the time there were several times at which the plaintiff was not actively engaged in the repairs.

## 4. MECHANICS' LIENS—TIME FOR FILING—FRAUD.

In such case evidence *held* not to show fraudulent intent in making the final repairs so as to permit filing of lien after it should have expired.

## 5. MECHANICS' LIENS—TIME FOR FILING—FRAUD.

Evidence *held* insufficient to show that the contract was performed in a certain month, so as to make invalid a notice filed more than six months thereafter.

## 6. MECHANICS' LIENS—WAIVER—EVIDENCE—SUFFICIENCY.

Under the rule that one holding a lien will not be held to have waived it by an ambiguous agreement, evidence *held* insufficient to show a waiver of a mechanic's lien.

APPEAL from Second Judicial District Court, Washoe County; *Thomas F. Moran*, Judge.

Action by J. E. Gaston against Mary Avansino, as Administratrix of Estate of Louis Avansino, Deceased, and others. From the judgment and order denying a motion for a new trial, defendants appeal. **Affirmed.**

*Mack & Green*, for Appellant:

The court erred in its finding of fact that defendant did not post lien notices as required by section 2221, Revised Laws. The testimony of plaintiff on this point was merely negative. (*Ophir M. Co. v. Carpenter*, 4 Nev. 534; *Dalton v. Dalton*, 14 Nev. 419; *Pinschower v. Hanks*, 18 Nev. 99.)

The court erred in finding that the lien had been filed within the time required by law. On this point there is no conflict of evidence. (*Hunter v. Truckee Lodge*, 14 Nev. 34; *Lonkey v. Wells*, 16 Nev. 271.)

An agreement between the owner and the person furnishing labor or material, that the latter will not claim or file a lien, is a waiver of the right to a lien. (*Bowen v.*

*Aubrey*, 22 Cal. 572; *Insenman v. Fugate*, 36 Mo. App. 169; *Matthews v. Young*, 40 N. Y. Supp. 27; *Iron Co. v. Murray*, 38 Ohio St. 327; *Hughes v. Lansing*, 75 Am. St. Rep. 578; *Davis v. La Crosse H. Assn.*, 99 N. E. 352.)

*Dixon & Miller*, for Respondent:

An examination of the record will disclose that this appeal can be fairly said to be a frivolous one, without any substantial error or ground being set up, either in the record or in appellant's brief. There was a substantial conflict in the evidence, but the lower court found that defendant had not posted the statutory notice, and that plaintiff had filed his lien within the time required by law. The transcript shows conclusively admissions by appellant that he had notice of the work done under the contract, set up in the claim of lien, within two days after the contract had been entered into. (*Gould v. Wise*, 18 Nev. 253; *Rosina v. Trowbridge*, 20 Nev. 106; *Tonopah L. Co. v. Nevada A. Co.*, 30 Nev. 445.)

By the Court, MCCARRAN, J.:

This was an action in foreclosure of a mechanic's lien. In the court below judgment was rendered in favor of the lienholder, respondent herein. From the judgment and from an order denying a motion for a new trial, appeal is taken to this court. The labor was performed and the material furnished by respondent at the instance and request of the lessee of the premises of Louis Avansino, deceased. It is admitted that the work was done and the material furnished in bringing about certain alterations and changes in the premises, and was within the knowledge and with the consent of Louis Avansino. Louis Avansino having died since the judgment was rendered in the lower court, Mary Avansino, administratrix of the estate of Louis Avansino, was substituted as party defendant and appellant herein.

1, 2. It is the contention of appellant that the court erred in finding the fact that the defendant, appellant herein, did not give notice by posting in writing on the premises in some conspicuous place, stating that he, the

defendant, would not be responsible for any material furnished or labor done in the alteration and repair of the building.

Section 2221 of the Revised Laws, 1912, provides:

"Every building or other improvement mentioned in section 1 of this act, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land, or upon the building or other improvement situate thereon."

It was the contention of appellant in the court below that due and sufficient notice was given, by posting in a conspicuous place in the building a certain notice testified to by Louis Avansino, Jr. Louis Avansino, Jr., testified that about the 10th or 11th day of November, 1912, he wrote out a notice, signed it with his father's name, and posted the same in a conspicuous place in the building.

The testimony of the witness Kirby Unsworth is to the effect that on one occasion he saw the witness Louis Avansino, Jr., with a paper in his hand; that on the paper was what he would term a rough notice in handwriting; that he saw Louis Avansino, Jr., go into Kane's Cafe, the premises in question, carrying this paper. The witness Unsworth, in attempting to fix the time at which his attention was drawn to the notice in the hand of Louis Avansino, Jr., said:

"Q. Can you recall to mind whether or not you accompanied the son from any place to that building for any purpose some time back? A. Last fall, during the noon

hour, I met one of the boys, Louis, near Conant's grocery store as I was going out of Conant's, and accompanied him down as far as Kane's Cafe."

The trial of this case took place in June, 1914; and, if the witness's testimony in this respect was correct, the time at which he saw the notice in the hands of Avansino was nearly a year subsequent to the commencement of the work.

The witness Louis Avansino, defendant in the court below, as well as the witness Maggilo, testified to having seen the notice posted on a swinging door, a conspicuous place in the premises.

It is the contention of appellant that this testimony was not contradicted, except by witnesses who testified that they did not see the notice; in other words, they contend that no positive testimony was given denying the notice. We think the view of appellant in this respect is untenable, inasmuch as the record discloses the following testimony elicited from the respondent, Gaston, a witness in his own behalf:

"Q. Now, Mr. Gaston, at the time you entered into this oral contract with Kane, Incorporated, for alteration repairs to which you have testified, was there any notice posted upon those premises anywhere to the effect that Mr. Avansino, the owner of the building, would not be responsible for work done thereon? A. No, sir; there was not.

"Q. Was there any such notice posted upon those premises at the time you commenced work on the 11th of November, 1912? A. No, sir.

"Q. Was there any such notice posted there at any time during the month of November, 1912? A. No, sir.

"Q. Was there any such notice posted upon those premises during the month of December, 1912? A. No, sir.

"Q. Was there any such notice posted upon those premises at any time during the month of January, 1913? A. No, sir.

"Q. Was there any such notice posted upon those premises anywhere during the month of February, 1913? A. No, sir.

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"Q. Was there any such notice posted anywhere upon those premises during the month of March, 1913? A. No, sir.

"Q. Was there any such notice posted upon those premises anywhere during the month of April, 1913? A. No, sir."

The witness McDermott testified to having worked in the building as a plumber during the month of March, 1913; that he made some search for notice, and saw none at that time.

The witness Harry Kelly testified that he worked in the building during the month of November, 1912, and also in January, 1913; that he saw no notice.

The witness C. W. Farrington testified that he worked in the building as a carpenter during the month of November, 1912, and as late as May 23, 1913, and that he saw no notice.

The witness E. J. Brennan testified that he worked in the building during the months of November and December, 1912; that his work and employment took him all over the building; and that he saw no notice posted.

The witness Johnson testified that he worked in the building for several days during the month of November, 1912, and saw no notice.

The witness Otto Koehler testified that during the month of December, 1912, he worked in the building as a paper-hanger and painter, and saw no notice.

The testimony of several other witnesses was to the same effect.

Whatever might be said as to the negative nature of the testimony of the witnesses called in behalf of respondent in the court below, the testimony of the respondent himself was positive upon the question that no notice was posted. On this question, then, there was a substantial conflict of testimony; and, there being positive and substantial evidence produced by the respondent himself upon which the finding of the court on the question of fact as to the posting of the notice can be supported, the rule universally adopted by this court, and by nearly all other courts of last resort, is applicable here,

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and the finding will not be disturbed. (*Tonopah Lumber Co. v. Nevada Amusement Co.*, 30 Nev. 445, 97 Pac. 636; *Turley v. Thomas*, 31 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 667.)

3. It is the contention of appellant that the trial court erred in finding that the lien was filed within the time required by law. They contend here, as they contended in the court below, that the work was completed in February, 1913, and that services performed thereafter by respondent were no part of the original contract, but were separate contracts for which separate liens should have been filed, and that the lien notice filed by respondent on August 9, 1913, was not filed within the statutory time. Indeed, from a standpoint of the evidence produced, as well as from a standpoint of the law applicable, this is the closest question presented in the case.

It was the contention of respondent in the court below, and testified to, that on the 9th of November, 1912, he entered into an oral contract with the lessee of the building, to wit, Kane, Incorporated, to furnish labor and material for the alteration, changing, and repair of the building for the convenience of Kane, Incorporated. The terms of the agreement, according to the testimony of respondent, were that respondent was to do the work and furnish the labor and material, and that Kane, Incorporated, was to pay respondent at the rate of \$6 per day for his labor, \$5 a day for carpenters whom he employed, \$2.50 a day for carpenter helpers, \$4 a day for brick-mason helpers, and \$7 a day for brick masons. The testimony of respondent, Gaston, in this respect is as follows:

"Q. You say— What was the alteration? Describe that work to be done under that agreement. A. Well, at that time the work that was outlined was rebuilding the dining-room, to take out the old kitchen out of the dining-room, and take the stairs out of the front and put them in again in the rear, or better than one-third or halfway in the building—they were running the upstairs there—put in a hall from Virginia Street to the dining-room,



and put in the toilets and other conveniences, and put in lunch counters, and put in a front on the building and other alterations, both upstairs and downstairs, and the cellar.

"Q. And also to supply the materials of that work, were you? A. Yes, sir.

"Q. And all labor? A. Yes, sir; that is, the carpenters' labor only.

"Q. The carpenter labor? A. Yes, sir; and the common labor, of course, and the brick masons and brick helpers—those.

"Q. How was that amount of money to be paid? A. Well, it was to be paid as the work progressed along; to receive payments, and the balance at the completion of the work.

"Q. When did you begin that work? A. On the 11th day of November, 1912.

"Q. And you got through, finished it, when? A. On the 21st day of June, 1913.

"Q. And did you perform all of that contract, all that you agreed? A. Yes, sir.

"Q. All of the work? A. Yes, sir.

"Q. Furnished the materials that you agreed to furnish? A. Yes, sir."

On cross-examination the respondent, Gaston, testified that the reason for delay in the completion of the work was to suit the convenience of Kane, Incorporated, who was conducting a saloon and restaurant business in the premises.

It appears from the record that the labor performed by the respondent in and about the premises and in the alteration and improvement of the building was commenced on or about the 11th of November, 1912, and that from time to time changes and alterations and improvements other than those contemplated in the original contract were suggested by the lessee of the building. There appear to have been times when no improvements or alterations were being made and when the respondent was not in or about the premises at all; at other times it

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appears that he was sent for by the lessee and asked to make other changes or alterations or to supply other material; and the last item of service performed or material furnished appears to have been on June 21, 1913, when a screen door was furnished and hung in place by respondent. As we take it from the record before us, all of the work and material went to the common purpose, which common purpose was the object of all parties to the original contract, *i. e.*, the rearrangement and improvement of the premises to suit the business that was to be conducted by the lessee, Kane, Incorporated.

T. J. Kane, the original maker of the contract with respondent, in testifying as to the making of the contract and its general terms and nature, and especially referring to the last item of service performed, said:

"I had a talk when I called him to put in the screen door, and I thought possibly that he would balk at it, but he didn't. Every time I called him he came to me and done the work, knowing the circumstances; that I could not pay in full.

"Q. You called him to put in the screen doors like you called him to do the other work? A. I did; yes, sir."

It appears that by reason of the several items of service performed and the several items of material furnished in alteration of the building the sum of \$1,176 accrued to the respondent under the contract. It further appears that from time to time small sums of money were paid by Kane, Incorporated, to the respondent in part payment of the services already performed; the total of these sums being approximately \$636, leaving a balance due and unpaid of \$540.

In our judgment, the case presented by the record is one of a continuing contract. While it is true that the materials furnished and the services performed were furnished and performed on several different occasions, yet they all went to the one object, namely, the alteration and improvement of the premises to fit the same for the business being carried on by the lessee. It may be true, as indicated by the record, that on one occasion or even on several occasions, the respondent, lien claimant,

was not working in or about the premises, and the work commenced up to that time may have been completed, but it would appear that at all times the lienholder was looked to by the lessee for the further carrying out of changes and alterations and improvements in the premises whenever such changes or alterations or improvements appeared necessary to the fulfilment of the original purpose; and it further appears that the lien claimant always responded to the request of the lessee for the making of changes or alterations or the furnishing of materials.

The establishment and recognition of mechanics' liens under such conditions has been approved by the courts in more instances than one. In the case of *Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614, 43 N. E. 878, the Supreme Court of Indiana, in passing upon a case where under the contract the materials were to be supplied from time to time as needed in the making of repairs and improvements extending over a considerable number of months, said:

"If each order and delivery of materials during the progress of an improvement constituted a separate contract, and required a separate lien, it will be readily seen that, instead of providing a practical, simple, and efficient method of security to the laborer and materialman, as the statute certainly intends, a complication would arise, requiring many liens or the delivery of all materials at one time, or the performance of all labor by continuous and uninterrupted service."

In the case of *Smalley v. Gearing*, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797, the Supreme Court of Michigan held that, where a contractor entered into an agreement with the materialman, whereby the latter was to furnish all materials of a certain kind for a building without any specific quantity being designated, and such material was delivered to the contractor from time to time, the time for filing a lien claim commenced to run on the last delivery. To the same effect is the case of *State Sash & Door Mfg. Co. v. Norwegian Danish E. L. A. Seminary*, 45 Minn. 254, 47 N. W. 796.

In matters of this kind it is not necessarily the contract,

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but rather the furnishing and use of the materials and the putting of the same into the building, or the performing of the services upon the premises with the knowledge and consent of the owner of the premises, that constitutes the grounds for the lien. Whatever may have been said by other courts, or whatever may be said by other authorities upon the subject, this court has given valuable expression, in the light of which the question under consideration may be solved. The case of *Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219, presented facts quite analogous to the case at bar. There the details of the testimony show that a number of contracts were taken by several of the lien claimants, some taking two or more contracts; others but one. These contracts were completed at specified dates. The miners who had taken these contracts, when their contracts were completed, either took a new contract or commenced work by the day in the same mine. The mine closed down without paying its employees, and liens were filed by the miners, which liens included the amounts due to each claimant for his entire labor under the contracts and for his labor by day's wage. The court, in passing upon the case, commented as follows:

"In the case at bar there was not in reality any new employment. The character of work was the same, viz, labor and work done on the mine. The amount to be paid varied with the peculiar character of the work at different times."

"It would be a harsh and unreasonable rule of construction," says Mr. Justice Hawley, in speaking for this court, "in these cases to hold that the statute required separate liens to be filed for each contract to enable the laborer to secure his wages. The injustice of such a rule would be greater to the mine owner than the laborer. It would destroy the credit necessary at times to have in order to continue operations on the mine, or add unnecessary costs and litigation by filing and foreclosing a multiplicity of liens.

The case of *Skyrme v. Occidental M. & M. Co.*, *supra*, was referred to approvingly in *Capron v. Strout*, 11 Nev.

304, and also in the case of *Ferro v. Bargo Mining and Milling Co.*, 37 Nev. 139, 140 Pac. 527. To the same effect is the reasoning in the following cases: *Salt Lake Hardware Co. v. Chainman Mining & Electric Co.* (C. C.) 137 Fed. 632; *Salt Lake City v. Smith*, 104 Fed. 457, 43 C. A. 637.

4. As we stated at the outset, the question last discussed is perhaps the closest one presented by this case, and is one which demands most careful scrutiny. It may be well to observe here that in the record before us it does not appear that the act of respondent, Gaston, in performing the last service, to wit, the hanging of the screen door on the premises, was done for the purpose or with the intent of extending the time within which he might file his lien for the other service performed or material furnished. There is nothing in the record to indicate, nor is it contended by appellant, that this service was performed for the sole purpose of permitting respondent to file his lien within the statutory time. There is nothing before us indicating fraud on the part of respondent. It may be well to observe here that, had such a condition been presented, the rule which we have asserted here could not operate in favor of respondent.

5. The witness T. J. Kane, called as a witness for the appellant, testified:

"The real work was done about the 1st of February; something like that."

From this statement the appellant contends that the trial court should have held that services performed or material furnished by respondent after the 1st of February were separate items of services, and hence the notice of lien was void, not having been filed within the time prescribed by statute. However, other statements found in the record made by the witness Kane, as well as the testimony of the respondent, Gaston, warrant us in the conclusion that there was substantial evidence produced upon which to support the finding of the court.

The record here discloses that the object sought to be accomplished was the alteration and improvement of the premises of appellant; that the services of respondent,

as well as the material furnished by him, were devoted to the accomplishment of the primary purpose. The services performed and the material furnished were performed and furnished from time to time to suit the convenience of the lessee of the building. Many of the changes and alterations made in the interior of the building by respondent and many items of material furnished by him were not taken into consideration or contemplated at the original making of the contract. This is not an unusual thing in bringing about alterations and changes in building interiors, where the building has in the past been used for some particular business, and a new business about to be installed therein requires different arrangements, many of which cannot be reasonably foreseen at first. Treating the whole as a continuing contract, the filing of the lien notice within the statutory time after the completion of the last services performed by respondent entitled the respondent to a lien for the whole, less the sum total of the amounts paid thereon. Our conclusion reached as to the second assignment of error discussed in appellant's brief would conclude the third assignment of error also.

6. It is the contention of appellant that the respondent, by agreement with Louis Avansino, the owner of the premises, specifically waived his right of lien. In this respect the testimony of Louis Avansino, Sr., the owner of the building, is to the effect that about the 11th or 12th of November, and after leasing the premises, he saw some men working in the old dining-room, of whom respondent was one, and that on going in there he told them, in effect, that he would not be responsible for any work done by them in the place. He further testified, in effect, that the respondent, Gaston, at that time said to him, in substance, that he had a contract; that he would get his money from Kane; that he would "make no trouble" for Avansino. The witness further stated, in substance, that Gaston at that time said to him that he would hold Kane responsible for the work and services performed. The testimony of the respondent, Gaston, in this respect

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is to the effect that on the occasion he stated to Avansino that, if Kane was given a chance, he would pay for the labor and material. The witness, however, denied that he at any time stated to Avansino, or to any other person, that he would release Avansino or the premises from responsibility.

It is the contention of appellant that respondent by his acts and utterances made to and in the presence of Louis Avansino, the owner of the building, waived his right of lien as against the premises on which the labor was being performed and the material furnished. As to whether or not the respondent could by parol agreement waive his right under the statute to a lien for the services performed or the material furnished it will be unnecessary to determine in this case.

The statements of the respondent, Gaston, testified to by the witness Louis Avansino, Sr., upon which it is contended that the former waived his right of lien, are uncertain, even if viewed in the light most favorable to the contention of appellant. We may with propriety observe in passing that, as a general proposition of law, a release of a lien will not be inferred from doubtful expressions (Jones on Liens, vol. 2, p. 747); and, as stated by many authorities, where the terms of the agreement are ambiguous or uncertain on the question of release, the doubt should be resolved against the waiver. (*Davis v. La Crosse Hospital Association*, 121 Wis. 579, 99 N. W. 351, 1 Ann. Cas. 950.) Between the testimony of the respondent and that of appellant here there is a sharp and distinct conflict. The trial court had opportunity to observe the conduct and demeanor of the several witnesses upon the stand, and, after so observing and listening to the testimony given, found against the contention of appellant here. In this instance, not only is there a substantial conflict in the testimony, but there is substantial evidence upon which the finding of the court in this respect may be supported, for which reason we will not disturb the same. (*Anderson v. Feutsch*, 31 Nev. 501, 103 Pac. 1013, 105 Pac. 99.)

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Points decided

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We deem it unnecessary, in view of our position here expressed, to touch upon other matters raised in appellant's brief.

The judgment of the lower court and the order appealed from should be affirmed.

It is so ordered.

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[No. 2141]

STATE OF NEVADA, RESPONDENT, v. J. FRANK  
TRANMER, APPELLANT.

[154 Pac. 80]

1. CONVICTS—CRIMES—POWER TO PUNISH.

Where accused was serving a life sentence in the state prison for murder, the district court had jurisdiction to order his production before it for trial on another murder charge.

2. HOMICIDE—CORPUS DELICTI—PROOF.

The *corpus delicti* of a murder may be established by inference from facts as well as from positive testimony.

3. HOMICIDE—SUFFICIENCY OF EVIDENCE.

In a trial for murder, evidence held sufficient to establish the *corpus delicti*.

4. CRIMINAL LAW—WITNESSES—REFRESHING MEMORY—HARMLESS ERROR.

Where, on a murder trial, a witness was allowed to refresh his memory as to a statement made by accused, by reading his testimony at the coroner's inquest, and his testimony given after such refreshing was substantially the same as before, there was no reversible error, since accused was not prejudiced thereby.

5. CRIMINAL LAW—JOINT PRINCIPAL AS WITNESS—IMPROPER QUESTION—MISCONDUCT.

Where, on a murder trial, a principal with accused in the murder, who had been previously convicted and sentenced to death, was produced as a witness by the state, and during the early part of his examination counsel for accused had asked the state in the jury's presence whether it was admitted that witness was then under conviction of a felony and in the state's prison, it was misconduct for the state's counsel to ask the witness whether he was not then in the penitentiary under sentence of death, where the only object of the state's question was to influence the jury to assess the death penalty against accused.



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Argument for Appellant

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## 6. CRIMINAL LAW—JOINT PRINCIPAL—CONVICTION—DEATH PENALTY—TESTIMONY.

On a trial for murder, where a joint principal in the crime with accused who had been previously convicted and sentenced to death is called as a witness by the state, it is reversible error to allow the state, for the purpose of influencing the jury to inflict the death penalty on accused, to ask the witness if he is in the state's prison under sentence of death.

## 7. CRIMINAL LAW—COMPETENCY—CONVICTS—JOINT PRINCIPAL.

One who was jointly indicted with accused for murder and on previous separate trial had been convicted was a competent witness for the state in a murder trial under Rev. Laws, 5419, defining witnesses, and Rev. Laws, 7451, applying section 5419 to criminal actions.

## 8. CRIMINAL LAW—EXAMINATION OF WITNESS—REMARK OF TRIAL COURT—HARMLESS ERROR.

Where, on a murder trial, the testimony of a witness went solely to the identity of accused, and his participation in the crime had been clearly shown, the remark of the trial judge, made while counsel for defense was reading questions and answers of the witness at a former trial for the purpose of impeaching him, that " \* \* \* there is apparently no inconsistencies or contradictions," there being no substantial conflict between the two testimonies, was harmless error under the statute providing for the disregard of technical errors, where no substantial rights are denied.

## 9. WITNESSES—REDIRECT EXAMINATION—CONVICTED JOINT PRINCIPAL—OFFERS OF CLEMENCY.

On a murder trial, where, on cross-examination of a witness who had been previously convicted as joint principal in the crime on a separate trial, the defense asked him whether he had talked with the county officers including the district attorney, it was a proper exercise of the court's discretion to allow the state on redirect examination to ask the witness whether he had not been informed that no clemency would be extended to him for testifying in the case, since the inference that offers of clemency had been made might have arisen from such previous question by the defense.

APPEAL from Second Judicial District Court, Washoe County; *Edward A. Ducker*, Judge.

J. Frank Tranmer was convicted of murder in the first degree, and he appeals. **Affirmed.**

[See, also, 35 Nev. 56, 126 Pac. 337, 41 L. R. A. n. s. 1095.]

*J. M. Frame*, for Appellant:

The evidence wholly fails to establish the *corpus delicti*.

## Argument for Appellant

In order to prove the *corpus delicti* in a case of homicide, it is necessary to clearly establish the death of the person alleged to have been killed, and that it was produced by the criminal agency of some other person. (*Redd v. State*, 40 S. W. 374; *State v. Ah Chuey*, 14 Nev. 79, 68 L. R. A. 35; *Wickerhorn v. People*, 2 Ill. 128; *Cozzens v. Gillespie*, 4 Mo. 82.)

To prove the *corpus delicti*, mere identity of name is not sufficient. (*People v. Wong Sang Lung*, 84 Pac. 843; Jones on Evidence, sec. 100; *Bryan v. Kales*, 31 Pac. 517; *Wickerhorn v. People*, *supra*; *Cozzens v. Gillespie*, *supra*.)

The lower court, lacking jurisdiction and legal custody of defendant, had no legal right to proceed under the second indictment. (11 Cyc. 1006; 12 Cyc. 196, 197, 220; *Ex Parte Johnson*, 42 L. Ed. 103; *Ewing v. Mallison*, 70 Pac. 369; *Missouri P. R. Co. v. Love*, 59 Pac. 1072; *State v. Miller*, 54 Kan. 244; *Covell v. Heyman*, 111 U. S. 182, 28 L. Ed. 390; *State v. Chinante*, 55 Kan. 326.) As defendant was already in custody under a judgment and sentence in another cause, the right of the state to proceed with the second indictment was suspended, for the reason that the sentence already pronounced was superior in authority and completely absorbed all right to the custody of the defendant as long as the same was in force. (*Ex Parte Buck*, 120 Mo. 479, 25 S. W. 573; *State v. Bell*, 111 S. W. 29; *Ex Parte Meyers*, 44 Mo. 280.)

The witness Urie, being under conviction of a felony, was civilly dead, and incompetent to testify; and his testimony was not competent for the further reason that he was jointly charged with the defendant with the commission of the crime alleged. (Rev. Laws, 7160.)

The comments of the lower court, in the course of the trial, upon certain testimony, were prejudicial to the defendant, and not cured by the failure to except thereto. They were in the nature of an instruction by the court, and consequently a violation of the constitutional right of the defendant. (*State v. Tickel*, 13 Nev. 502; *State v. Ah Tong*, 7 Nev. 152; *People v. Bonds*, 1 Nev. 36; *State v. Harkin*, 7 Nev. 381; *McMinn v. Whelan*, 27 Cal. 319; *State v. Scott*, 37 Nev. 412.)

*Geo. B. Thatcher*, Attorney-General, and *E. T. Patrick*, Deputy Attorney-General, for Respondent:

The *corpus delicti* was completely established. The record shows conclusively that the deceased died within a year and a day of the shooting with which appellant was charged in the indictment, and that she was the same person upon whose body an autopsy was performed. (*State v. Kilgore*, 70 Mo. 546; *Sheppard v. People*, 72 Ill. 480; *People v. Mullen*, 94 Pac. 57; *Cavaness v. State*, 43 Ark. 231; *People v. Lagroppo*, 90 App. Div. N. Y. 219.)

The lower court had full jurisdiction to try defendant on the second indictment. (*Ex Parte Tranmer*, 35 Nev. 56, 41 L. R. A. n. s. 1095; *Ex Parte Allen*, 196 Mo. 226.)

The testimony of Urie was clearly competent. (Rev. Laws, 7451.)

No objection having been made by defendant to the remarks of the trial court in commenting upon certain evidence, they do not constitute reversible error. (*Gaudette v. Travis*, 11 Nev. 151; *Thunder v. Brown*, 12 Nev. 86; 38 Cyc. 1324; *V. & T. R. R. Co. v. Elliott*, 5 Nev. 358; *Longabaugh v. R. R. Co.*, 9 Nev. 271; *McLeod v. Lee*, 17 Nev. 103; *Paul v. Cragnaz*, 25 Nev. 293.)

Not every unguarded remark of a trial judge is ground for reversal. To be so, it must be shown to be prejudicial to the rights of the party complaining, or at least appear probable that prejudice resulted; and it is ordinarily held that error in making improper remarks is cured by instructing the jury to disregard them. (38 Cyc. 1316; *State v. Burwell*, 52 Kan. 686; *Bond v. State*, 129 Pac. 666.)

The objection of appellant to the action of the trial court in permitting a witness to refresh his memory, and the criticism of certain conduct of the district attorney in the course of the trial, are extremely frivolous.

A conviction will not be set aside for errors which do not affect the substantial rights of the accused. (Rev. Laws, 7302, 7459; *State v. Mircovich*, 35 Nev. 489.)

By the Court, COLEMAN, J.:

The appellant, J. Frank Tranmer, was indicted in the district court of Humboldt County, together with one

Nimrod Urie, for the murder of Maria D. Quilici. Separate trials were ordered, appellant was convicted of murder in the first degree, and the jury fixed the penalty at death. From a denial of a motion for a new trial, and from the judgment of the court imposing the death penalty, an appeal has been taken to this court.

1. At the time the case at bar was set for trial by the district court, appellant was serving a life sentence for the murder of one Eugene Quilici; and, when application was made to that court for an order that appellant be brought from the state prison for trial, appellant, through his attorneys, objected to the making of the order, for lack of jurisdiction. The overruling of the objection is assigned as error. The identical question here involved was before the court in *Ex Parte Tranmer*, 35 Nev. 56, 126 Pac. 337, 41 L. R. A. n. s. 1095, where the question was decided adversely to appellant's contention. Suffice it to say that we have carefully considered the point urged by appellant, and we think that the holding of the court in *Ex Parte Tranmer*, *supra*, is sustained by both reason and authority, and that no good purpose would be served by discussing the question at length in this opinion. An elaborate note to *Ex Parte Tranmer* may be found in 41 L. R. A. n. s. 1095, where it is stated that the great weight of authority sustains the position of the court in that proceeding. The only later case in point which we have been able to find is that of *State v. Rodgers*, 100 S. C. 77, 84 S. E. 304, which is in line with the views expressed in *Ex Parte Tranmer*, *supra*.

2. It is next urged that the evidence fails to establish the *corpus delicti*. In the case of *State v. Ah Chuey*, 14 Nev. 92, 33 Am. Rep. 530, it was held that the *corpus delicti* may be established as well by inference from facts as from positive testimony. In *State v. Cardelli*, 19 Nev. 324, 10 Pac. 436, it was said:

"While it is true that a person charged with the commission of a criminal offense is not called upon to answer the charge without satisfactory proof, upon the part of the prosecution, of the *corpus delicti*, yet it is not

essential, in all cases, that there should be any direct evidence upon this point."

Such is the general rule. (Wharton's Criminal Law, 11th ed. sec. 352, citing many authorities.) In 21 Cyc. at p. 1029, it is said:

"The sufficiency of the proof of the *corpus delicti* is a question for the jury."

3. The evidence in the present case is quite voluminous, and clearly shows that Eugene Quilici and Maria D. Quilici, his wife, resided at Imlay, Humboldt County, Nevada, on and for some time prior to January 6, 1911; that on that night the defendant and one Nimrod Urie, for the purpose of robbery, went to the saloon which was being run by Eugene Quilici, and shortly after entering the place shot both Quilici and his wife, Maria D. Quilici; that Eugene Quilici died instantly; and that one Maria D. Quilici died at Winnemucca, in the same county, about twenty-five miles from Imlay, on or about the 9th of that month, from a gunshot wound.

It is contended that the evidence fails to show that the Maria D. Quilici who died at Winnemucca was the same Maria D. Quilici who was shot at Imlay. We think the jury had ample evidence before it to justify it in finding that the Maria D. Quilici who died in Winnemucca was the Maria D. Quilici who was shot at Imlay. One Lommori, who was called as a witness on the part of the prosecution, testified as follows:

"Q. Did you know Maria D. Quilici in her lifetime? A. Yes, sir.

"Q. What relationship, if any, existed between you and Maria D. Quilici? A. She was my sister.

"Q. Where did she live? A. At Imlay. \* \* \*

"Q. Mr. Lommori, you realize the fact that the defendant Frank Tranmer or J. Frank Tranmer is being tried for the murder of your sister, do you? A. Yes, sir. \* \* \*

"Q. Was your sister married? A. Yes, sir.

"Q. To whom? A. To Eugene Quilici.

"Q. I will ask you if you were a witness at the coroner's

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Opinion of the Court—Coleman, J.

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inquest over the body of your sister, Mrs. Quilici? A. Yes, sir."

On cross-examination, the witness testified, in part, as follows:

"Mr. Frame (counsel for defendant)—Q. You testified in that preliminary, a short time after the occurrence of the killing of your sister, did you not, Mr. Lommori? A. Yes, sir, a short time afterwards. \* \* \*

"Q. Now, referring to your testimony given at the preliminary hearing between January 12 and January 19, 1911, the same occurring a few days after the occurrence in which your sister was killed, \* \* \* I will ask you to state whether you testified as a witness at and before the coroner's jury investigation for the death of your sister Maria D. Quilici, the same being held before Justice Dunn in the month of January, 1911, at Winnemucca, Humboldt County, Nevada, about January 9? A. I do not remember.

"Mr. Frame—I suppose it was admitted that it was given there?

"Mr. Woodburn (district attorney)—Yes, sir, it was there. That is correct. \* \* \*

"Q. Did you ever hear, just before the happening of the occurrence in which your sister was killed, of Mr. Quilici having an arrangement to buy the Robinson-Kelley saloon which was situated alongside of or near the Quilici saloon? A. Yes, sir. \* \* \*

"Q. Were you at the depot in Imlay on the day following the killing of your sister by some parties, about noon, when Sheriff Lamb brought the two men to the depot?"

From the foregoing extracts from the evidence it will be seen that witness Lommori testified that he knew that the defendant was on trial for the murder of his sister Maria D. Quilici, which was committed January 6, 1911, and that he attended the coroner's inquest over her body at Winnemucca on January 9, three days later, and the preliminary examination which was held a few days thereafter. Dr. Giroux testified to holding the autopsy in Winnemucca, and of giving testimony at the coroner's

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inquest January 9, 1911, which was held over the body of one Maria D. Quilici. We think the evidence is ample to establish the *corpus delicti*. The questions asked by counsel for defendant, as quoted, show that he considered the Maria D. Quilici over whose body the coroner's inquest was held to be the same person as Maria D. Quilici, the sister of Lommori.

4. Error is assigned, also, to the ruling of the trial court in permitting the witness Urie to refresh his memory by reference to testimony given by him at the former trial. The witness was asked what the appellant said to him after the crime had been committed and when he (witness) told appellant that he had lost his mask, to which he replied:

"Well, he said that was a bright trick and he ought to kill me.

"Q. What is that? A. He said that was a bright trick and he ought to kill me.

"Q. Do you remember the exact words? A. No, I don't know as I can remember the exact words, but something to that effect."

At this point in the proceedings the witness, over the objection and exception of defendant, was permitted to read the testimony given by him at the coroner's inquest:

"Mr. Callahan—After refreshing your memory, can you give the exact language used by the defendant at that time?"

After objection and exception by counsel for defendant, the witness answered:

"I can now after I read that.

"Q. Just give the language used by the defendant in reply to your statement that you had lost your mask. A. I told him I had lost my mask, and he says: 'You are a pretty son of a ——. I ought to plug you right here.'"

Professor Jones, in his work on evidence, at section 878, says:

"In some jurisdictions, it is held that a witness may refer to a former affidavit or deposition given by him for the purpose of refreshing his memory. While in other

states this is not allowed, as it is held that the practice is in violation of the rule that a memorandum to refresh the memory should have been made at or about the time to which it relates"—citing authorities.

Since the killing was on January 6, and the coroner's inquest three days later, it would seem that the reason given by Professor Jones for excluding such testimony does not apply in this case; but we will not undertake to determine what the law on this point is, as the two statements are substantially the same, and we are unable to see that any prejudice could have been done appellant by the ruling of the court.

5. Appellant also assigns as ground for reversal the action of the district attorney in asking the following question:

"Mr. Callahan—Q. I will ask you to state, Mr. Urie, if you are not now in the penitentiary of the State of Nevada under sentence of death."

Upon objection being made, it was sustained, and the jury was directed by the court to disregard the question entirely. Soon after this witness had begun to give his testimony, counsel for appellant, in the presence of the jury, and before the question quoted was asked, addressing the district attorney, said:

"Mr. Callahan—I suppose it is admitted that this witness is now under conviction of a felony and is in the state's prison?"

There is in our judgment nothing in the preliminary question or suggestion made by counsel for the defendant, "I suppose it is admitted that this witness is now under conviction of a felony and is in the state's prison?" which sustains the position of counsel for the state in urging, or which would justify this court in saying, that defendant's counsel had "opened up the subject, and in all probability brought to the attention of the jury the real status of the witness Urie." For the purpose of raising the objection to the competency of the witness Urie to testify on behalf of the state, it was necessary for counsel for defendant either to request the opposing counsel to



admit the fact, or to ask leave to prove as a foundation for the objection that the witness Urie was in the state prison under conviction of a felony, and was a codefendant of the defendant Tranmer.

While we will hold that the objection to the competency of the witness Urie is without merit, the objection was anything but one of a frivolous character, as suggested in respondent's brief on appeal. The question has never before been raised in the courts of this state, and there are but few cases directly in point. A consideration of the following cases where the question has been considered will be sufficient answer to the charge that the objection of counsel for defendant was "frivolous": *People v. Labra*, 5 Cal. 183; *People v. Newberry*, 20 Cal. 440; *Ex Parte Stice*, 70 Cal. 55, 11 Pac. 459; *McGinness v. State*, 4 Wyo. 115, 31 Pac. 978, 53 Pac. 492.

Independent of the question of the competency of Urie as a witness, defendant had the statutory right to show that the witness was under conviction for a felony, for the purpose of affecting his credibility as a witness. This right counsel for the state were unquestionably aware of. The record contains the following statement made by assistant counsel for the state:

"Mr. Woodburn—Now, if your honor please, we have no objection to that question being stricken out, and the jury being instructed to disregard it. It was made in good faith, and we thought we would just show the status of this witness, because it goes to his credibility, and it was done under no desire to prejudice the defendant, and it was first suggested through counsel's question as to the status of this man as to where he was living at this time, and, if counsel insists, we are satisfied to have the jury instructed that they may disregard the testimony of the witness on that point."

6. From a reading of the record we are impressed that the purpose of the question was to get before the jury the fact that Urie was under sentence of death for his participation in the murder of the Quilicis, for the purpose of influencing the jury when they came to consider the

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Opinion of the Court—Coleman, J.

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question whether they should impose death or life imprisonment as the penalty for defendant's crime. In our opinion the asking of the question was highly reprehensible conduct on the part of counsel asking it, and if it had been answered would have constituted reversible error.

It should be borne in mind, in the consideration of this assignment of error, that the defendant Tranmer was already under conviction of murder in the first degree, with sentence of life imprisonment, for the murder of Eugene Quilici, and that from the judgment in that case no appeal had been taken. There was no purpose sought to be accomplished, or which could be accomplished, by the trial of the defendant Tranmer for the murder of Maria Quilici, except to obtain, if possible, a conviction of first-degree murder, with the death penalty imposed. There was, however, no duty imposed upon counsel representing the state to bring before the jury facts clearly incompetent for the purpose of influencing the jury in fixing the penalty which the law authorized it to prescribe. Upon the contrary, counsel for the state owed a duty to defendant not to attempt to offer such evidence. At the time the question objected to was asked, counsel for the state undoubtedly knew what the testimony of the witness Urie would be. They knew that such testimony, in a measure at least, was having the indorsement of the representatives of the state as to its verity, and that Urie's testimony made him out to be less blamable than the defendant Tranmer; that, if Urie spoke the truth, Tranmer was the instigator of the robbery which led to the murder; that Urie was a reluctant participant, acting under a certain degree of compulsion, and fired none of the shots which resulted in the death of the Quilicis. In view of this testimony, it is not hard to conceive of a fact that might have a greater influence in persuading the jury to impose the death penalty upon Tranmer than the fact that another jury had imposed the death penalty upon Urie, who might under the evidence have been regarded as morally, if not legally, less guilty than Tranmer.

It is no answer to the seriousness of this assignment that the question was suggested by the prior question and objection of counsel for defendant. It was not so suggested. Counsel for the state, upon this appeal, we think should have presented some more substantial basis for holding this assignment of error to be without merit. In our opinion, the improper question may be regarded as not prejudicing the substantial rights of defendant solely because it was not answered and because the jury was promptly instructed "to entirely disregard the question."

It is only in recent years that a number of states have so changed their criminal codes as to permit the jury in first-degree murder cases to fix the penalty at death or life imprisonment. In but few cases has the question arisen as to whether evidence, not admissible upon the question of the guilt or innocence of the defendant, may nevertheless be offered for the purpose of influencing the jury as to the penalty in their discretion to be imposed. This question was touched upon by the Supreme Court of California in the recent (1915) case of *People v. Witt*, 148 Pac. 928. In the opinion in that case, Angellotti, C. J., speaking for the court, said:

"It is not claimed that the offered testimony was relevant or material on the issue as either guilt or degree of crime, but simply that, inasmuch as the jury had the right to assess the punishment in the event of conviction at either death or life imprisonment, appellant was entitled to have admitted for their consideration evidence as to matters not otherwise relevant or material. We are of the opinion that our law does not contemplate any such independent inquiry on a trial for murder, and that the determination of the jury, under the provisions of section 190, Penal Code, as to death or life imprisonment, is necessarily to be based solely on such evidence as is admissible on the issues made by the indictment or information and the plea of the defendant.

See, also, *State v. Thorne*, 41 Utah, 414, 126 Pac. 286, Ann. Cas. 1915D, 90.

7. It is next insisted that the trial court erred in

## Opinion of the Court—Coleman, J.

overruling appellant's objection to the competency of witness Urie to testify in behalf of the state. In support of this assignment of error, it is said:

"First, that Urie, being under conviction of a felony, was disqualified as a witness except in cases where called at his own request and in his own behalf. Second, for the further reason that the record discloses that Urie was jointly indicted and jointly charged with the defendant. \* \* \*

It was provided by section 1441 of the Compiled Laws of Nevada (1873) that:

"Persons against whom judgment has been rendered upon a conviction for felony, unless pardoned by the governor, or such judgment has been reversed on appeal, shall not be witnesses."

This court, in an opinion written by Mr. Chief Justice Beatty, in *State v. Foley*, 15 Nev. at page 73, 37 Am. Rep. 458, said:

"It may be that the tendency of enlightened opinion and of recent legislation in other states and countries is against the rule which absolutely excludes the testimony of a convict; it may be that it is an unwise and impolitic rule; but it is unquestionably the law of this state. Not only is the common law unaltered by statute in this particular, but in civil practice it is expressly reaffirmed. (Comp. Laws, 1441.) This shows that the legislature approves the policy of the common-law rule, and we cannot hold that it is less essential in criminal than in civil cases; we feel bound, on the contrary, to maintain it as strictly in one class of cases as in the other."

This opinion was rendered in 1880. It is significant that at the next session of the legislature, in 1881, the section quoted was repealed.

It is provided by section 5419, Revised Laws, that:

"All persons, without exception, otherwise than as specified in this chapter, who, having organs of sense, can perceive, and perceiving can make known their perceptions to others, may be witnesses in any action or

proceeding in any court of this state. Facts which, by the common law, would cause the exclusion of witnesses, may still be shown for the purpose of affecting their credibility."

There is no provision in the chapter prohibiting persons charged with, or convicted of, a crime, from being called as witnesses. The section just quoted is made applicable to criminal as well as civil actions by section 7451, Revised Laws. In the case of *Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025, Mr. Justice Bonnifield, in commenting upon section 5419, Revised Laws, *supra*, said:

"The evident object the legislature had in view in enacting the above provisions was to abrogate the general common-law rule which rendered incompetent, as witnesses, in an action or proceeding, the parties thereto or persons having a direct interest in its results, except, as provided in certain subsequent sections, among which is section 379, which declares 'that no person shall be allowed to testify, when the other party to the transaction is dead, or when the opposite party to the action or person for whose immediate benefit the action or proceeding is prosecuted or defended is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased persons.'"

We do not see how the legislature could have used more significant language. What was the intention of the legislature in making the section in question applicable to criminal cases? This was the first section in chapter 1 of title 11 (page 405) of Compiled Laws of 1873, and section 1441, *supra*, was the fifth section of that chapter. When the attention of the legislature was called to section 1441, *supra*, by the opinion of Mr. Chief Justice Beatty, it was promptly repealed; and, in view of the action of the legislature in repealing it, we must conclude that the legislature meant exactly what it said, that "all persons, without exception," should be competent witnesses, and that facts which, at common law, would disqualify a witness, might be considered as

affecting his credibility. We are of the opinion that the court did not err by its ruling.

8. Counsel for defendant, during the cross-examination of the witness Lommori, for the purpose of impeaching him by showing that he had testified contrary to the testimony which he gave upon direct examination, read certain questions propounded to him and answers given by him at a former trial, and asked him if he gave such testimony. During the reading of the former testimony, the presiding judge made the remark:

“As far as you have gone and read the testimony into the record, there are apparently no inconsistencies or contradictions.”

This remark by the court is assigned as error. The attorney-general concedes that it was error for the court to make the remark, but claims that it was harmless. We have read the testimony of the witness Lommori with great care, and are unable to see that there is any substantial conflict between his testimony given on the trial and the testimony given at the previous hearing. This being true, it would seem that the remark of the court was without prejudice. Furthermore, the point on which it was sought to impeach this witness went solely to the question of the identity of the defendant; that is, of connecting him with the crime. To our mind his participation in the crime is clearly shown; there can be no doubt about it. Consequently, it would seem that in any event the remark was harmless. Mr. Chief Justice Talbot, in *State v. Mircovich*, 35 Nev. at page 490, 130 Pac. at page 766, called attention to our statute, which provides that the court shall disregard technical errors where no substantial rights are denied, and said:

“This court has often applied this statute in murder and other cases, and refused to set aside convictions or remand actions for new trials for errors which did not affect the substantial rights of the accused.”

The witness Urie, at the time of the trial in the district court, was under sentence of death for the

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Opinion of the Court—McCarran, J.

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murder of Mrs. Quilici. On cross-examination, counsel for the defendant inquired of this witness if he had talked with the officers of Humboldt County, including the district attorney, and he said he had. Upon the completion of the cross-examination, the following questions were asked by the district attorney and answers given by the witness:

"Q. I call your attention to last Sunday evening, and ask you to state whether you had a conversation with Mr. Woodburn and myself, here in the county jail.  
A. Yes, sir; I don't remember what evening it was.

"Q. Who else was present at the time? A. Mr. Burke.

"Q. The sheriff? A. The sheriff.

"Q. Any one else? A. Yes, there was a deputy, I guess; I don't know his name.

"Q. I will ask you to state whether or not at the time you were distinctly informed that there would be no consideration of any kind extended to you for testifying in this case.

"Mr. Frame—I object to the question as incompetent, irrelevant, and immaterial, and for the further reason that it is not proper redirect examination, and that it calls for a conversation, or conversations, that are in no way related to the case.

"The Court—The objection may be overruled.

"A. No, none that I remember.

"Mr. Frame—Note an exception, if your honor please, upon the grounds stated."

9. The ruling of the court is assigned as error. It is the contention of the state that the inference from the examination of counsel for defendant was that some promise had been made to the witness Urie, and it was the purpose of this examination to rebut that inference. Counsel for the defendant, during the argument on the objection, stated in the presence of the jury:

"I did not ask him whether he had received any promises. It is true that inference may be drawn."

The court must exercise some discretion in ruling upon such objections. He saw the witness upon the stand and

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Opinion of the Court—Coleman, J.

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heard him testify, and was in a good position to know just how the cross-examination impressed the jury upon the point in question. We cannot say that the court abused its discretion.

The judgment and order denying the motion for a new trial are affirmed, and the district court is directed to fix a time and make the proper order for having its sentence carried into effect by the warden of the state prison.

*Per Curiam:*

Petition for rehearing denied.

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA

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JANUARY TERM, 1916

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[No. 2206]

STATE OF NEVADA, RESPONDENT, *v.* C. A.  
WHITAKER, APPELLANT.

[154 Pac. 927]

1. CRIMINAL LAW—APPEAL AND ERROR—REVIEW—EVIDENCE SUPPORTING VERDICT.

Judgment in a criminal case will not be reversed for insufficiency of evidence where the verdict is supported by substantial evidence.

2. BURGLARY—CONVICTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for burglary in the first degree, evidence held to justify verdict of guilty against a defendant.

3. BURGLARY—BURGLARY IN THE FIRST DEGREE—TIME OF BREAKING—SUFFICIENCY OF EVIDENCE.

In a prosecution for burglary in the first degree, evidence held sufficient to justify finding that the mill was broken into in the nighttime, between sunset and sunrise, as defined by Rev. Laws, 6634.

APPEAL from Tenth Judicial District Court, Clark County; *Charles Lee Horsey*, Judge.

C. A. Whitaker was convicted of burglary in the first degree, and from the judgment and an order denying his motion for a new trial, he appeals. **Affirmed.**

*F. R. McNamee* and *Leo A. McNamee*, for Appellant:  
There is no evidence connecting the defendant with

## Argument for Appellant

the commission of the crime, or that would justify the jury in returning a verdict of burglary in the first degree. The evidence, in the most favorable light for the state, could sustain a verdict of burglary in the second degree only. (*State v. Gray*, 23 Nev. 301.) It will not be presumed that the entry was made between sunset and sunrise. The facts from which this may be inferred must be proved, and it must not be left to presumption, conjecture, or inference. (6 Cyc. 231, 242-3; *People v. Griffin*, 19 Cal. 578, 16 Cyc. 1051; *U. S. v. Ross*, 23 L. Ed. 707.)

Where there is uncertainty as to which one of several persons committed the crime, all must be acquitted. (12 Cyc. 493, note 95; *People v. Woody*, 45 Cal. 289.)

The testimony of the defendant was in all respects consistent with innocence, as were also his conduct and actions from the time he was first intercepted until the completion of the trial. "If the evidence as a whole is consistent with the theory of defendant's innocence, the verdict of guilty should be set aside." (12 Cyc. 489.)

To warrant a conviction on circumstantial evidence, each fact necessary to the conclusion must be proved by competent evidence beyond a reasonable doubt. (12 Cyc. 489.) All the circumstances proved must be consistent with each other, consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis of innocence, and with every other rational hypothesis except that of guilt. (12 Cyc. 488.)

If there is no competent evidence to sustain a verdict of conviction, the judgment, on the point being properly presented, will be reversed. (*State v. Ah Tom*, 8 Nev. 213; *Territory v. Booth*, 36 Pac. 38.) When there is no evidence to establish the charge set forth in the information, a question of law is presented, on which the appellate court will be competent to act. (*People v. Smallman*, 55 Cal. 185-191.)

Where there is a clear failure of proof, the propriety of conviction on the evidence before a jury becomes a question of law, within the competence of the appellate

court. (*People v. Kuches*, 120 Cal. 566-569; *State v. Weber*, 31 Nev. 385; *State v. Thompson*, 31 Nev. 209; 12 Cyc. 907.)

*Geo. B. Thatcher*, Attorney-General, and *Edward T. Patrick*, Deputy Attorney-General, for Respondent:

The court is without jurisdiction to hear and determine the appeal, the only assignment of error in the entire record being the order of the court below denying the motion for a new trial upon the ground of the insufficiency of the evidence to sustain the verdict and that the verdict is contrary to law and the evidence. An appeal to the supreme court from the district court can be taken on questions of law alone. (Rev. Laws, 7287; Nev. Const., art 6, sec. 4.)

The verdict in a criminal case will not be reversed where there is any evidence to sustain it. (*State v. McGinnis*, 6 Nev. 109; *State v. Ah Tom*, 8 Nev. 213; *State v. Hoff*, 11 Nev. 17; *State v. Raymond*, 11 Nev. 98; *State v. Crozier*, 12 Nev. 300; *State v. Mills*, 12 Nev. 403; *State v. Wong Fun*, 22 Nev. 336; *State v. Preston*, 30 Nev. 301; *State v. Thompson*, 31 Nev. 209.)

By the Court, COLEMAN, J.:

Appellant and two others were charged jointly in Clark County with the crime of burglary in the first degree. The jury brought in a verdict of guilty as to appellant, and not guilty as to the other defendants. This appeal is taken from an order denying a motion for a new trial and the judgment.

It was charged that the defendants broke into the mill of the Searchlight Mining and Milling Company and stole therefrom nine or ten amalgamating plates. The evidence against defendants was entirely circumstantial, and the only error assigned is that there was no evidence upon which a verdict of guilty could be based; and that even if there was evidence that appellant burglarized the mill, there was a total failure to show that it was done in the nighttime, which is the essential ingredient of burglary in the first degree.

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Opinion of the Court—Coleman, J.

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1. It has been held by this court in numerous instances that a criminal case will not be reversed for insufficiency of the evidence if there is substantial evidence to support the verdict. (*State v. Thompson*, 31 Nev. 217, 101 Pac. 557.) Appellant finds no fault with this rule.

2. Witnesses in behalf of the state testified that the plates in question were in the mill on July 13, 1915, but that on the 15th of that month it was discovered that the mill had been broken into and the plates taken out. When it was discovered that the mill had been burglarized, the deputy sheriff at Searchlight, two miles away, was notified, and he at once took steps to apprehend the guilty parties. He called to his assistance a number of men in the vicinity. It was sought to track the persons who had committed the crime. One of the lessees of the mill testified that shortly after the "clean-up," which took place about July 1, he put papers on the plates to protect them. Some of the witnesses testified that they traced fragments of papers and small portions of amalgam from the plates for a distance of about 200 feet from the mill, at which point tracks of horses were discovered, which were trailed to the camp of the defendants. One of the witnesses who did the trailing testified that he had shod the horses, and that a cut-off shoe was put on one foot by him, which enabled him to distinguish the track. It was also testified that in places leading from the mill to where the horses were mounted, and at other points along the trail, there were tracks of two men, one of whom wore shoes with hobnails in them, and that on one shoe the nails were broken from the heel in a particular place, which made the track easy to identify.

This witness also testified that after the defendants had been arrested and taken to Searchlight he observed the track of appellant, and it was the same (with some missing nails) as the one he saw leading from the mill and along the trail of the paper, and which he saw in other places leading to the camp of defendants.

The plates weighed about 450 pounds; and as the horses were small, and defendants' camp twenty-one miles from

the mill, it was the theory of the state that defendants thought it too much of an undertaking to have the horses make the trip from the camp to the mill and back, carrying the plates.

The plates were not found in the possession of any of the defendants, but were found on July 27 about two miles from the mill, rolled up. At the camp of defendants a canvas was found. One witness testified as to the appearance of this canvas:

"Q. What marks, if any, did you find on the canvas?

A. A long, narrow mark, taking up about the length of the canvas.

"Q. Resembling what? A. Well something hard enough to make that mark had been resting against it, and also—

"Q. Will you pick out the canvas that you say you saw?

A. Yes, sir (Witness examines first piece of canvas). That doesn't show anything extra. (Witness examines second piece of canvas.) That is one of the marks, I guess.

"Q. This mark along here? A. Yes, sir.

"Q. What is the color—what color does that resemble?

A. Sediment and mud.

"Q. Off of what? A. It may have been from the plates, and it may have been—where that piece were cut out it was thicker and heavier. It isn't so very heavy along here.

"Q. I call your attention to two holes there where some stuff has been cut out. A. There?

"Q. Yes. A. Yes, sir.

"Q. Who cut it out? A. My partner.

"Q. In your presence? A. No sir; not in my presence.

"Q. Well I thought you knew about its being cut. What about this? (exhibiting piece of canvas to witness). I direct your attention to a spot here, and will ask you if you know what it is? A. Let me see it first (witness examines canvas). That shows very poorly, but it may be some of the sediment.

"Q. I call your attention to some pieces of that canvas

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being cut out. What do you know about that? A. I was not present when that was cut out.

"Q. Where were these pieces of canvas when you saw them? A. Laying at the door, beside the old packsaddle.

"Q. At whose door? A. At the cabin door of the camp where these boys were camping.

"Q. What boys? A. Craigs and Whitaker. \* \* \*

"Q. You may state whether you made an examination of the canvas before the pieces were cut out? A. I did. I examined this with a glass.

"Q. A microscope? A. Yes, sir.

"Q. What was the result you found? A. Why you could see the amalgam on this canvas with a glass at that time, but it was loose on the canvas?

"Q. It wasn't ground into the canvas? A. No; not where I could see, it wasn't.

"Q. Did you find amalgam in these pieces that were cut out? A. Well, you couldn't see it.

"Q. I mean with the glass did you find it? A. Well, yes; where those pieces were cut out you could.

"Q. Did you make any other examination of these canvases? A. No; just examined where those marks were on there.

"Q. Did you examine this line? A. Yes, sir.

"Q. What did you find? A. I found amalgam along there, and you could see quicksilver.

"Q. You examined that with a microscope? A. Yes, sir.

"Q. This amalgam that you found there you say was not ground into the canvas? A. No; it was loose at that time; that is, what you could see of it.

"Q. This amalgam that you speak of, was it in the shape of mud on the canvas? A. Yes. There was ground-up sand with it. \* \* \*

"Q. I call your attention to a spot on this canvas that I hold in my hand. What would say this was? A. I would call that sand myself. There might be amalgam in it, but it is sands off plates.

"Q. Calling your attention to this light line, what would you say about that? A. Well, that is a line—it looks like

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it might have been wrapped around the plates that were stolen. The sands—the peculiarity about it is the white. It looks like the sands had been pounded up fine.

"Q. Two places in that line you cut out? A. Yes, sir.

"Q. Why? A. Because it had heavy sands and looked like there was little specks of amalgam in it. That is the reason I had it cut out, to have it assayed, to be sure that there had been such a thing as amalgam in it."

The assays showed values of about \$8,000 per ton.

The horses which it is claimed the defendants used on the night of the burglary had been in charge of one Booth, by whom they were delivered to a son of one of the defendants on July 13, for the purpose of taking them into California. That night he stayed at the camp of defendants, twenty-one miles away. According to the evidence for the defense, this boy left the camp of defendants on the 14th and arrived in Barnwell, Cal., that night; but according to the evidence of the state, he did not arrive there until the 17th. The evidence for the state is to the effect that the horses were returned from Barnwell, Cal., forty-one miles away, upon telephonic communication, on the 19th, and that they were leg-weary when they reached Searchlight. The evidence on the part of the state also shows that these identical horses made two trips to the camp of defendants and one from there to the mill, the theory of the state being that one set of tracks was made when the horses were taken to defendant's camp by the boy, and that the tracks leading away were made by the horses while the defendants were using them to go to the mill to burglarize it, and the others on their return to the camp.

Each of the defendants, and a brother of the two defendants who were acquitted, testified that they were at work at their property all of the time from the 12th to the 17th of July, on which last-mentioned day the arrests were made.

It is upon these circumstances that appellant was convicted. Can we say that there was no evidence to justify the verdict? It may be that had we heard the testimony

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we would have acquitted appellant, but we cannot say that the jury was not justified in finding him guilty. It is claimed that the testimony was the same against all of the defendants, and that if the jury did not think all of the defendants guilty they should have acquitted appellant. We do not think this contention sound. The evidence showed that there were only two men tracked from the mill. The tracks of one indicated that they were made with hobnail shoes. Evidence was offered to the effect that appellant wore hobnail shoes, while the jury could not tell which of the other two defendants was the person tracked from the mill, and consequently acquitted both. If the jury believed the testimony of the witness as to the tracks made by a hobnail shoe leading from the mill being identical with those made by appellant at Searchlight, and also the theory of the state that the amalgam on the canvas was due to the fact that some of the plates were rolled in it, we think the jury was justified in its finding.

3. The only evidence tending to show that the mill was burglarized in the nighttime is to the effect that candle grease was found in the mill:

"Q. Now, Mr. Lund, I would like you to tell me and tell this jury if those plates were on those tables the day you were in there just before the robbery? A. Yes, sir.

"Q. They were in place and on the table? A. They were.

"Q. Well, how can you say, then, that this candle grease wasn't on those tables then, when they were covered by the plates? A. You can tell candle grease when it is newly spilled any time.

"Q. The plates were on top of the candle grease, weren't they? You may be able to do that, but you don't understand my question. You say the candle grease was not on those tables the day before? A. It was not; no.

"Q. Now, if those tables were covered up by the plates, how could you possibly tell? A. No; but that candle grease would have to be flattened out with those heavy plates on it, and this was a thick grease, standing up this high (indicating).



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Opinion of the Court—Coleman, J.

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"Q. Those plates weigh 400 or 500 pounds? A. They do.

"Q. And if they set down on those tables how can you tell that candle grease wasn't there? A. Because the weight of those plates would have flattened that candle grease out, and this was not flattened out at all.

"Q. Yes; that is true enough, but the day before you couldn't say there was no candle grease there? A. No; I couldn't see through the plates.

"Q. Then if it was covered up by the plates you couldn't have told, so you don't know whether it was there the day before or not; isn't that a fact. A. I know this was newly spilled candle grease. It showed plain evidence of it. \* \* \*

"Q. You say you had no candles in the mill? A. Yes, sir.

"Q. You have used candles in the mill, haven't you? A. I never, from the time we started, remember the time when we used candles there."

This is all of the testimony in the record to sustain the finding that the mill was burglarized in the nighttime. What, if any, inference should be drawn from the finding of candle grease in the mill? So far as appears, there were no electric lights in the mill, and we cannot indulge the presumption that there were, particularly since that locality is sparsely settled. The mill was operated only periodically, and was probably run only in the daytime. It is a well-known fact that candles are used to provide light, and it will be inferred that the candle grease found in the mill as was testified to was caused by a lighted candle. A lighted candle is used for only one purpose, and that is to enable one to see; and since nighttime is from sunset to sunrise (Rev. Laws, 6634), and since in the middle of July there is in Nevada a long space of time both after sunset and before sunrise which is light, we cannot say that the jury was not justified in inferring that the mill was burglarized in the nighttime. As was said in *State v. Druzman* (Wash.) 153 Pac. 382:

"The choice between contrary inferences from evidence, like the credibility of conflicting evidence, is always for the jury."

In *State v. Watkins*, 11 Nev. 30, it was shown that

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certain articles, which were in a room at 9 o'clock at night, were missing in the morning; that it was impossible for any one to have taken them without entering the room, and they were found in defendant's possession between 12 and 1 o'clock the same night. To the objection that the evidence did not establish the burglary, the court said:

"It was necessary to show that the entry was effected in the nighttime, and proof that defendant had in his possession, outside of the house, between 12 and 1 o'clock, goods which were in the house at 9 o'clock, and which only could have been obtained by entering the house, was proof of an entry in the nighttime."

We cannot say that, in drawing the inference that the mill was burglarized in the nighttime, the jury abused its prerogative.

The judgment is affirmed.

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## Argument for Appellant

[No. 2186]

SOUTHERN PACIFIC COMPANY (A CORPORATION),  
APPELLANT, v. C. N. MILLER, GEORGE F.  
THOMPSON, AND A. E. BETTLES, RESPONDENTS.

[154 Pac. 929]

1. VENDOR AND PURCHASER—REMEDIES OF VENDOR—RECOVERY OF  
PURCHASE MONEY.

Under Rev. Laws, 5501, limiting the remedy of a mortgagee to an action in foreclosure, where plaintiff, by executory contract, agreed to sell land, retaining title and reserving the right to maintain a suit for the foreclosure of the agreement and any equity of redemption of the purchasers, although, pursuant to the contract, the purchasers went into possession, plaintiff could recover in a personal action for the unpaid balance of the purchase price, not being restricted to an action for foreclosure, as it was not a mortgagee, because a mortgagor holds legal title, and a mortgagee only an equitable lien.

## 2. MORTGAGES—MORTGAGEE'S RIGHT.

In a mortgage legal title is in the mortgagor, and the mortgagee holds only an equitable lien.

## 3. VENDOR AND PURCHASER—REMEDIES OF VENDOR—ACTION FOR PURCHASE MONEY—TENDER OF CONVEYANCE.

In an action by the agreed vendor of realty for the unpaid balance of the price, the averment in the complaint that plaintiff was and had been ready to convey, as agreed, upon performance of the contract by defendants, with an offer to deliver conveyance into court, was a sufficient tender.

APPEAL from Seventh Judicial District Court, Mineral County; *Peter J. Somers*, Judge.

Action by the Southern Pacific Company against C. N. Miller and others. From a judgment for defendants, plaintiff appeals. **Reversed**, and case remanded for new trial.

*Frank Thunen* and *W. M. Singer*, for Appellant:

The judgment is contrary to the facts as found by the trial court. (Rev. Laws, 5342.)

The contract is not a mortgage and cannot be subject to the provisions of section 5501, Revised Laws. (*Hyman v. Kelly*, 1 Nev. 179; *Glock v. Howard*, 123 Cal. 1.)

Appellant, though a creditor, is not a mortgagee. It holds the title. (*Bank v. Kreig*, 21 Nev. 404; *Orr v. Ulyatt*,

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23 Nev. 134; 27 Cyc. 961; *Longmaid v. Coulter*, 123 Cal. 208; *Samuel v. Allen*, 98 Cal. 406.)

Specific performance is granted in favor of a vendor of land as freely as in favor of a vendee. (Pomeroy's Eq. Jur., vol. 6, sec. 747.)

Appellant made sufficient tender of conveyance. (*Smith v. Mohn*, 87 Cal. 489.)

No objection having been made in the lower court to the sufficiency of appellant's averment of tender, the point cannot be raised for the first time on appeal. (*Duff v. Fisher*, 15 Cal. 375; *Parkside R. Co. v. MacDonald*, 166 Cal. 426.)

*John R. Melrose and Mack & Green*, for Respondents:

Foreclosure is the appellant's exclusive remedy. (Rev. Laws, 5501.) No action can be maintained for the recovery of the debt secured by a mortgage other than by a proceeding in foreclosure. (*Hyman v. Kelly*, 1 Nev. 180; *Bartlett v. Cottle*, 63 Cal. 366; *Biddle v. Brizzolara*, 64 Cal. 354; *Porter v. Muller*, 65 Cal. 512; *Brown v. Willis*, 67 Cal. 235; *Hibernia S. & L. Soc. v. Thornton*, 109 Cal. 427; *Winters v. Hub M. Co.*, 57 Fed. 287.)

The mortgagee is bound to exhaust his security afforded by the mortgage by a foreclosure suit before he can exercise any other remedy or obtain a personal judgment for any deficiency. (*Weil v. Howard*, 4 Nev. 384; *Gnarini v. Swiss Amer. Bank*, 162 Cal. 181; *Barbieri v. Ramelli*, 84 Cal. 154; *Salt Lake L. & T. Co. v. Millspaugh*, 18 Utah, 283; *Wiltzie on Mortgage Foreclosure*, 3d ed. 1913, secs. 11, 963.)

If a pledge of property as security for a debt is shown, a right of redemption necessarily follows. (27 Cyc. 1801, 1802.)

Generally speaking, whenever a transaction resolves itself into a security for a debt, it is a mortgage. (Words and Phrases, vol. 5, p. 4597; *Wiltzie on Mortgage Foreclosure*, sec. 963; *Elliott on Contracts*, vol. 5, secs. 4606, 4607; *Strauss v. White*, 66 Ark. 167, 51 S. W. 64.)

There having been no tender to respondents of a deed

to the premises described in the contract, there could be no decree of specific performance. (Elliott on Contracts, vol. 3, p. 511, sec. 2333; 39 Cyc. 1537; 26 Am. & Eng. Ency. Law, 113; 29 Am. & Eng. Ency. Law, 686, 690; *McCroskey v. Ladd*, 96 Cal. 455; *Bohall v. Diller*, 41 Cal. 532.)

By the Court, MCCARRAN, J.:

This action was brought in the court below to obtain judgment in favor of the plaintiff, appellant herein, against defendants, respondents herein, for the sum of \$750, being an unpaid balance, principal on a certain agreement made between appellant and respondents. The agreement, which furnished the basis for the action is as follows:

"This agreement, made the 15th day of March, A. D. 1907, between Southern Pacific Company, a corporation created and existing under laws of the State of Kentucky, first party, and C. N. Miller, George F. Thompson, and A. E. Bettles, of the County of Esmeralda, State of Nevada, second parties, witnesseth that for the sum of one thousand (\$1,000.00) dollars, lawful money of the United States, to be paid at the times and in the manner and upon the terms and conditions hereinafter set forth, first party agrees to sell to second parties, and second parties agree to purchase from first party, all that certain lot, piece, or parcel of land situate in the town of Mina, county of Esmeralda, State of Nevada, particularly described as follows, to wit: Lot six (6) in block ten (10), as shown and delineated upon the map of said town filed by first party in the office of the county recorder of said county of Esmeralda, on the 18th day of September, 1905, and recorded in Book of Surveys at page 2, records of said county, to which reference is hereby made for further description.

"Second parties have paid to first party the sum of two hundred and fifty (\$250.00) dollars, and agree to pay the balance of said purchase price, to wit, the sum of seven hundred and fifty (\$750.00) dollars, in installments as

follows, to wit: Three hundred and seventy-five (\$375.00) dollars on or before one year after date; three hundred and seventy-five (\$375.00) dollars on or before two years after date—together with interest on the unpaid principal from date until paid, at the rate of 6 per cent per annum, payable annually, and second parties shall also pay all taxes and assessments of every kind and nature which may prior to full payment of all said installments of said principal and interest thereon be assessed, levied, or imposed upon the premises afore described or any part thereof.

"And upon full payment of said installments of said purchase price and accrued interest thereon, and all taxes and assessments upon said premises, as aforesaid, first party covenants and agrees to convey said premises to second parties by good and sufficient deed of grant, bargain, and sale, free and clear of all liens and incumbrances made, done, or suffered by it.

"And it is agreed that time, wherever mentioned herein, is an essence of this agreement, and that if the parties of the second part fail to pay any sum herein agreed to be paid for interest or taxes at the time, place, and as agreed to be paid, that all sums herein agreed to be paid, including the amount owing for unpaid purchase price, shall thereupon, at the option of the party of the first part, become immediately due and payable, and the party of the first part, its successors or assigns, may sue for and recover the sum or sums so due for interest, for taxes, or for both, by personal action for the same as money due and owing; or the party of the first part, its successors or assigns, may at its or their option sue for and recover all sums due and unpaid, including the unpaid purchase price, by action in foreclosure of this agreement, or by personal action against the parties of the second part, as for moneys due and owing, and that either or any of such suits may be brought without any tender, demand or notice whatever from the party of the first part, and that the party of the first part may levy upon any money or other property of the parties of the second part to recover

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Opinion of the Court—McCarran, J.

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the amount of judgment obtained, and may, but need not, first resort to the right or property vested in the parties of the second part by these presents.

"It is further understood that, subject to this agreement, and during the continuance thereof, second parties shall have the right to take possession of, use, and occupy the premises aforesaid.

"This agreement shall bind the successors, heirs, and assigns of the parties hereto.

"In witness whereof first party has caused these presents to be signed by its duly authorized land agent, and the second parties have hereunto set their hands the day and year first above written.

"Southern Pacific Company,

"By Wm. H. Mills, Land Agent.

"C. N. Miller.

"George F. Thompson.

"A. E. Bettles."

The court below, among other things, found as follows:

"The court further finds that by reason of the fact that plaintiff, by said contract and agreement, granted to defendants the right to enter into the possession and use, occupy, and enjoy said premises, and by reason of the fact that said defendants did enter into the possession of said premises, and by reason of the fact that plaintiff retained the legal title to said premises as security for the payment of the unpaid purchase price thereof, and by reason of the further fact that said plaintiff, by said contract and agreement, reserved the right to institute and maintain a suit or action for the foreclosure of said agreement and the foreclosure of any and all equity of redemption of said defendants, the said transaction and plaintiff's rights under said contract and agreement was tantamount to, and, in effect, a mortgage upon, the said lands and premises to secure the payment of said unpaid purchase price, and that by reason of the provisions of section 5501 of the Revised Laws of the State of Nevada plaintiff is limited to its remedy by a suit or action for the foreclosure of said mortgage, and

this court is without jurisdiction to render a judgment for said alleged debt in this action."

Upon the foregoing finding judgment was rendered against appellant. From this judgment, direct appeal is taken to this court. The question to be determined here is: Was the agreement tantamount to and in effect a mortgage?

1, 2. If, as a matter of fact, the relation of mortgagor and mortgagee was established between the vendor and vendee by the making of this agreement and the conferring of possession upon the vendee, then the judgment of the trial court must be confirmed, because section 5501, Revised Laws, limits the remedy available to appellant as mortgagee to an action in foreclosure. The statute provides:

"There shall be but one action for the recovery of any debt, or for the enforcement of any right secured by mortgage or lien upon real estate or personal property, which action shall be in accordance with the provisions of this chapter. In such action, the judgment shall be rendered for the amount found due the plaintiff, and the court shall have power, by its decree or judgment, to direct a sale of the encumbered property, or such part thereof as shall be necessary, and apply the proceeds of the sale to the payment of the costs and expenses of the sale, the costs of the suit, and the amount due to the plaintiff."

The principle that a mortgage on real property in this state is not an alienation, but rather a security for debt, has been established by decisions of this court: *Hyman v. Kelly*, 1 Nev. 179; *National Bank v. Kreig*, 21 Nev. 404, 32 Pac. 614; *Orr v. Ulyatt*, 23 Nev. 134, 43 Pac. 916.

By these decisions it has been established that a mortgage of real property amounts merely to an equitable lien upon the property.

It is the contention of respondents, and this contention was affirmed by the finding of the trial court, that, inasmuch as the agreement provided that the title should remain in the vendor, and that possession should be



enjoyed by the vendee, these provisions were sufficient to establish the relationship of mortgagor and mortgagee. If we apply to this reasoning the decisions of this court in the cases of *National Bank v. Kreig* and *Orr v. Ulyatt*, *supra*, it follows that, inasmuch as it is the established law of this state that a mortgage is not an alienation, but merely a security for debt in the form of an equitable lien, then, the vendor in this instance retaining, as it did, the title to the property and never parting with the same, its position in the premises is something more than a mortgagee; and, as stated in *Gessner v. Palmateer*, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187, the security held by the vendor is something stronger than a mortgage, because the legal title is retained as security, whereas in a mortgage the legal title is in the mortgagor; the mortgagee holding only an equitable lien.

In the case of *Longmaid v. Coulter*, 123 Cal. 215, 55 Pac. 791, the Supreme Court of California, in a case analogous to the one at bar, referring to the code of civil procedure of that state equal in force and effect to that found in our statute (section 5501), held that a vendor who had retained the title as security for the purchase money, or his assigns of the debt, might sue for and collect the unpaid purchase money in an action at law without, in the first instance, resorting to an action to enforce the lien for the debt. It further held that section 726 of the code of civil procedure, corresponding to our statute section 5501, did not apply to such a case. To the same effect is the case of *Wood v. Mastick*, 2 Wash. T. 64, 3 Pac. 612.

As we said at the outset, the vital question presented here is as to whether or not the relationship between the parties, created by the contract of sale, was that of mortgagor and mortgagee. We think the most that can be said of the contract entered into between the parties is that it was an executory contract, reserving to the vendor not only the privilege, in case of nonpayment, to foreclose all the rights of the vendees, but, at the option of the vendor, to collect the unpaid portion of the purchase money by personal action against the vendees. Nor are

we able to discern any good reason for a rule which would assume to change the relationship thus created by the agreement into one of mortgagor and mortgagee solely because the vendee was, by the terms of the agreement, accorded the right to take possession. Why the mere taking possession of the property by the party who had, prior to the making of the agreement, never had possession, should transform the relationship existing between the parties to one of mortgagor and mortgagee, we are unable to discern. The vendee in this instance entered into an agreement with the vendor upon terms, the latter to sell, the former to buy, the premises described. The vendor never parted with title. It was only subject to the agreement, and during the continuance thereof, that the vendee acquired the right to take possession of or to use or occupy the property. To say that these conditions established the relationship of mortgagor and mortgagee between the parties who by their own act created the conditions, and at the same time to hold that an equitable lien only, and not the legal title, is by law vested in the mortgagee, would be to create an anomaly.

Cases presenting conditions such as those established by the record here are to be distinguished from cases where a conveyance has been actually executed, and a vendor's lien or other security reserved to insure the unpaid portion of the purchase price. Cases such as the one at bar are to be distinguished from those involving contracts in which by their terms the obligation to purchase is not assumed by the vendee.

3. It is the contention of respondents that appellant cannot demand specific performance, because of the failure of appellant to make sufficient tender of conveyance. In appellant's amended complaint we find the following averment:

"That the plaintiff has done and performed all things required by the terms and conditions of said contract, and has at all times, as provided in said contract, been and is now ready, able, and willing to convey said premises to defendants as agreed in said contract, upon the

## Points decided

performance of the terms and conditions in said contract by defendant to be performed, and now offers to deliver such conveyance into court."

In view of the position taken by respondents, we deem it unnecessary to dwell at length on this phase of the case. Suffice it to say that, in our judgment, this allegation, and the offer of appellant therein to deliver conveyance into court, constituted a sufficient tender. Indeed, the offer in this respect, and the averments thereof, appear to us to be much more than has been held sufficient by many courts. (*Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *Biddle v. Coryell*, 18 N. J. Law, 377, 38 Am. Dec. 521; *Roberts v. Beatty*, 2 Pen. & W. 63, 21 Am. Dec. 410.)

The judgment should be reversed, and the case remanded for a new trial.

It is so ordered.

[No. 2185]

SOUTHERN PACIFIC COMPANY (A CORPORATION),  
APPELLANT, v. MRS. C. BUTTERFIELD, C. N.  
MILLER, AND GEORGE F. THOMPSON, RESPON-  
DENTS.

[154 Pac. 932]

1. VENDOR AND PURCHASER—REMEDIES OF VENDOR—LIABILITY OF  
PURCHASER'S ASSIGNEE.

Where land was sold under contract providing that the agreement should bind the successors, heirs, and assigns of the parties, an assignee of the purchasers, who was not a party to the contract and did not execute, sign, or receive it, was not liable to the vendor for the unpaid balance of the price, since the promise of a purchaser of land to pay therefor cannot be enforced against his assignee, either in an action for specific performance or for damages, in the absence of agreement to that effect by the assignee.

APPEAL from Seventh Judicial Court, Mineral County;  
*Peter J. Somers*, Judge.

Action by the Southern Pacific Company against Mrs. C. Butterfield, C. N. Miller, and George F. Thompson. From a judgment for defendants, plaintiff appeals. Judgment as to defendant Thompson affirmed, and reversed as to

## Argument for Respondents

the other defendants, pursuant to the order of the court in Case 2186 (see page 169, *ante.*)

*Frank Thunen and W. M. Singer, for Appellant:*

The judgment is contrary to the facts as found by the trial court; the court reached an erroneous conclusion as to what judgment should follow the state of facts found. (Rev. Laws, 5342.)

Under our statutes, the contract can by no possibility be construed as a mortgage, and is not subject to the provisions of section 5501, Revised Laws. (*Hyman v. Kelly*, 1 Nev. 179.)

Under the agreement, the remedy is not a foreclosure as the term is understood with relation to statutory mortgages, nor for a breach is either the vendor or the vendee limited to a single remedy. (*Glock v. Howard*, 123 Cal. 1; *Longmaid v. Coulter*, 123 Cal. 208.)

Appellant, though a creditor, is not a mortgagee. It holds the title. (*National Bank v. Kreig*, 21 Nev. 404, 408; *Orr v. Ulyatt*, 23 Nev. 134; 27 Cyc. 961; Pomeroy's Eq. Jur., vol. 6, sec. 747.)

The assignee of the contract is bound by its terms. (9 Cyc. 387; *Cheney v. Bilby*, 74 Fed. 52; *Johnson v. Eklund*, 72 Minn. 195, 75 N. W. 14; *McPheters v. Ronning*, 95 Minn. 164, 103 N. W. 889; *Wagner v. Cheney*, 16 Neb. 202, 20 N. W. 222; *Grigg v. Landis*, 21 N. J. Eq. 494; *Cranston v. Wheeler*, 37 Hun, 63.)

*John R. Melrose and Mack & Green, for Respondents:*

No action can be maintained for the recovery of the debt secured by a mortgage other than a suit in foreclosure. (*Hyman v. Kelly*, 1 Nev. 180; *Bartlett v. Cottle*, 63 Cal. 366; *Biddle v. Brizzolara*, 64 Cal. 354; *Porter v. Muller*, 65 Cal. 512, 4 Pac. 531; *Brown v. Willis*, 67 Cal. 235, 7 Pac. 682; *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. 1086; *Hibernia S. & L. Soc. v. Thornton*, 109 Cal. 427, 50 Am. St. 52; *McKean v. German A. S. Bank*, 118 Cal. 334, 50 Pac. 656; *Commercial Bank v. Kershner*, 120 Cal. 495, 52 Pac. 848; *Crisman v. Letterman*, 149 Cal. 647, 87 Pac. 89;

## Opinion of the Court—McCarran, J.

*Windt v. Covert*, 152 Cal. 350, 93 Pac. 67; *Winters v. Hub Mining Co.*, 57 Fed. 287.)

The mortgagee is bound to exhaust his security afforded by the mortgage by a foreclosure suit before he can exercise any other remedy or obtain a personal judgment for any deficiency. (*Weil v. Howard*, 4 Nev. 384; *Gnarini v. Swiss A. Bank*, 162 Cal. 181, 121 Pac. 726; *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. 1086; *Salt Lake L. & T. Co. v. Mills-paugh*, 18 Utah, 283, 54 Pac. 893; *Wiltzie on Mortgage Foreclosure*, 3d ed. 1913, sec. 11.)

Generally speaking, whenever a transaction resolves itself into a security for a debt, it is a mortgage. (Words and Phrases, vol. 5, p. 4559; Elliott on Contracts, vol. 5, secs. 4606, 4607, 4650, 4660.)

Where a vendor enters into an agreement to sell real estate on credit and retains the legal title as security for the payment of the purchase price, the transaction is in effect a mortgage. (*Smith v. Robinson*, 13 Ark. 533; *Strauss v. White*, 66 Ark. 167, 51 S. W. 64; *Holman v. Patterson*, 29 Ark. 357; *McConnell v. Beattie*, 34 Ark. 113; *Lewis v. Boskins*, 27 Ark. 61; *Moore v. Anders*, 14 Ark. 628, 60 Am. Dec. 551; *Shall v. Biscoe*, 18 Ark. 142; *Tanner v. Hicks*, 4 Sm. & M. Miss. 294; *Paine v. McDowell*, 71 Vt. 28, 41 Atl. 1042; *Merritt v. Judd*, 14 Cal. 60.)

Not having tendered a deed, in no event could appellant be entitled to a decree of specific performance of the contract in issue. (Elliott on Contracts, vol. 3, p. 511, sec. 2333; 39 Cyc. 1307, 1537; 26 Am. & Eng. Ency. Law, 113; 29 Am. & Eng. Ency. Law, 686, 690.)

The assignee is not liable under the contract. A third person is not liable, as a rule, on a contract, express or implied, unless he was one of the immediate parties to the agreement or has become a party to it by subsequent agreement with the original parties. (9 Cyc. 386; Elliott on Contracts, vol. 2, secs. 1408, 1409, 1439.)

By the Court, MCCARRAN, J.:

The questions involved in this case are determined by the decision of this court in case No. 2186, to wit,

*Southern Pacific Co., a Corporation, v. C. N. Miller, George F. Thompson, and A. E. Bettles*, 39 Nev. 169, 154 Pac. 929, except in so far as the liability of respondent Thompson is concerned.

The contract involved in this case was one between appellant and respondents Butterfield and Miller for the sale and purchase of land. Stipulated payments were agreed upon, and time was made for the essence of the contract. The legal title was retained in the vendor, appellant herein. The right of occupancy and possession was by the terms of the contract accorded to the vendee.

It is alleged in appellant's amended complaint:

"That on December 13, 1907, defendant Mrs. C. Butterfield executed and delivered unto defendant George F. Thompson a conveyance transferring to said defendant Thompson the undivided one-half of the property rights and obligations of said Mrs. C. Butterfield under the contract above mentioned."

In the determination of the case the trial court found:

"That said defendant George F. Thompson was not a party to and did not execute, sign, or receive the said contract and agreement at the time of the execution thereof; that subsequent to the execution and delivery of said contract the said defendant Mrs. C. Butterfield made, executed and delivered to said defendant George F. Thompson her certain deed of conveyance conveying to said George F. Thompson all her right, title, and interest in and to the said lands and premises."

It is the contention of appellant that, inasmuch as the contract between appellant and respondents Butterfield and Miller provides that "this agreement shall bind the successors, heirs, and assigns of the parties hereto," respondent Thompson, being the assignee of one of the vendees under the contract, is by reason of the above-quoted provision responsible for the obligations created by the contract.

In the trial court, as well as in this court, the appellant took the position that the respondent Thompson's

liability grew out of his being the assignee of one of the vendees, under the contract. The complaint charges a conveyance from the vendee Butterfield to the respondent Thompson, transferring an undivided one-half of the property rights and obligations of the vendee. Let us assume, without determining, that this allegation was sufficient to charge Thompson with being the assignee of the vendee Butterfield. The law, we think, is well settled that the promise of a vendee of land to pay purchase money cannot be enforced against his assignee, either in an action for specific performance or in an action for damages, unless there is an agreement to that effect on the part of the assignee. The fact that a contract or agreement contains a provision, as in the case at bar, "binding the successors, heirs, and assigns of the parties hereto," is not of itself, as a general rule, sufficient to impose personal liability upon the assignee, unless by specific agreement to that effect or by an agreed substitution of the assignee for the vendee. (*Hugel v. Habel*, 132 App. Div. 327, 117 N. Y. Supp. 78.)

In the case of *Lisenby v. Newton*, 120 Cal. 571, 52 Pac. 813, 65 Am. St. Rep. 203, the matter under consideration was similar to that at bar, and the court held to the effect that an assignee of a contract for the purchase of land is not personally liable for the unpaid purchase price, and this, too, even though the contract of sale and purchase specifies that its provisions shall apply to and bind the heirs, executors, administrators, and assigns of the respective parties. The doctrine enunciated in that case was made in the light of the rule that a covenant of this kind made by a vendee is personal, and hence an assignee cannot be charged with its performance.

In the case of *Corbus et al. v. Teed*, 69 Ill. 205, the court held that the vendor of land under a contract assigned by the vendee must make tender of conveyance to the original purchaser. There being a lack of privity between the vendor and the assignee in the making or in the assignment of such a contract, it was

held that the former could not compel the latter to perform, even though the assignee had, after the taking of the assignment, carried out the provisions of the contract by making a payment thereon.

The holding of the Supreme Court of Michigan in the recent case of *Midland Savings Bank v. Prouty Co.*, 158 Mich. 656, 123 N. W. 549, 133 Am. St. Rep. 401, is to the same effect.

The Supreme Court of Georgia, in the case of *Couch v. Crane*, 142 Ga. 22, 82 S. E. 459, we think very properly held that an assignee of a vendee cannot be held liable to the vendor unless by agreed assumption of the vendee's obligations.

In the case of *Bimrose v. Matthews et al.*, 78 Wash. 32, 138 Pac. 319, the Supreme Court of Washington held that, in the absence of express agreement, the covenants of a purchaser of land to take title or pay the purchase money cannot be enforced against his assignee in the absence of an express agreement binding him so to do, and the court there had under consideration a case in which the contract of sale provided that the covenants therein contained should bind the assigns of the parties.

It is correctly stated by a recent and very reliable compilation that:

An assignment "cannot shift the assignor's liability to the assignee, because it is a well-established rule that a party to a contract cannot relieve himself of his obligations by assigning the contract. Neither does it have the effect of creating a new liability on the part of the assignee, to the other party to the contract assigned, because the assignment does not bring them together, and consequently there cannot be a meeting of the minds essential to the formation of a contract." (R. C. L. vol. 2, p. 626.)

There is an absence of the essential element of privity between the appellant company, as vendor under the contract, and the respondent Thompson, even assuming that the latter was the assignee of the vendee.



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Points decided

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The judgment of the lower court as to the respondent Thompson is affirmed. As to the respondents Butterfield and Miller, the judgment of the lower court is reversed, pursuant to the order of this court in case No. 2186.

It is so ordered.

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[No. 2215]

IN THE MATTER OF THE APPLICATION OF W. W. BOOTH  
FOR A WRIT OF HABEAS CORPUS.

[154 Pac. 933]

1. CRIMINAL LAW—TRIAL—VERDICT.

A judgment must follow and be supported by the verdict, and, if the verdict is not such as is determinative of the issues made by plea of not guilty, it is a void verdict, and the court has no jurisdiction to enter judgment thereon.

2. LIBEL AND SLANDER—OFFENSES—DEGREES.

Rev. Laws, 6428, declaring that every person convicted of libel shall be fined in a sum not exceeding \$5,000 or imprisoned in the county jail not exceeding one year, or in the state prison not exceeding five years, divides the crime of libel into two offenses, one a felony, and the other a misdemeanor.

3. LIBEL AND SLANDER—OFFENSES—PROVINCE OF JURY.

Under Rev. Laws, 6428, declaring that every person convicted of libel shall be fined in a sum not exceeding \$5,000, or imprisoned in the county jail not exceeding one year, or in the state prison not exceeding five years, and that the jury shall have the right to determine the law and the fact, together with section 7190, also declaring that the jury shall have the right to determine the law and the fact, the determination whether a libel is a felony or a misdemeanor is for the jury.

4. CRIMINAL LAW—TRIAL—VERDICT.

A verdict will not be held void for uncertainty if its meaning can be determined by reference to the record.

5. HABEAS CORPUS—ERRONEOUS VERDICT—DISCHARGE.

Though a verdict may be so erroneous as to warrant reversal without being entirely void, it will not authorize discharge on *habeas corpus* of one sentenced thereunder.

6. LIBEL AND SLANDER—OFFENSES—VERDICT.

Rev. Laws, 6428, declares that the punishment for libel shall be fine and imprisonment in the county jail, or imprisonment in the penitentiary, and that the jury shall be the judge

## Argument for Respondent

of the law and the fact. Section 7196 makes similar provision. Sections 7216 and 7218 declare that a verdict on a plea of not guilty shall be either guilty or not guilty, and that, if a crime is distinguished into degrees, the jury must find the degree, while sections 7221 and 7222 provide for the reconsideration of an informal verdict, and that no judgment of conviction shall be given unless the jury find expressly against the defendant. In a prosecution for libel the verdict was: "We, the jury, \* \* \* find the defendant \* \* \* guilty of a gross misdemeanor." *Held* that, as the jury were entitled to find the grade of the offense, and as the whole record might be looked to, the verdict was not so indefinite that a judgment entered thereon was void; such verdict indicating the degree of the offense of which accused was convicted.

ORIGINAL APPLICATION by W. W. Booth for a writ of *habeas corpus*. **Writ denied.**

*Platt & Sanford* and *Milton M. Detch*, for Petitioner:

The district court and the judge thereof had no jurisdiction to pronounce any sentence upon the verdict of the jury. Petitioner was put upon trial for an alleged violation of section 6428, Revised Laws, defining libel as a separate and distinct offense, and providing a punishment therefor; but the verdict of the jury found the petitioner guilty of a gross misdemeanor, which was not in response to the issues joined by the information and petitioner's plea, but was a verdict of guilty upon an entirely separate and distinct offense, for which he was not informed against. (*People v. Cummings*, 49 Pac. 576; *People v. Lee*, 237 Ill. 272; *Miles v. State*, 3 Tex. App. 53; *Howell v. State*, 10 Tex. App. 303; *Senterfit v. State*, 41 Tex. App. 187; *People v. Ah Gow*, 53 Cal. 672.)

The verdict is uncertain, in that it cannot be ascertained therefrom whether the jury intended to find the defendant guilty as charged in the information, or whether it was intended to find him guilty of some other offense, and is therefore null and void and of no legal effect.

*J. A. Sanders*, District Attorney, and *Geo. B. Thatcher*, Attorney-General, for Respondent:

The verdict of the jury was sufficient to give the court jurisdiction to pronounce the sentence. Courts disregard mere defects or irregularities such as alleged by the

petitioner in the present case. (*State v. Collyer*, 17 Nev. 275; *People v. McFadden*, 65 Cal. 445; *State v. Gray*, 19 Nev. 212; *People v. Brady*, 65 Pac. 823; *Mountain v. State*, 40 Ala. 346; *Conrand v. State*, 65 Ark. 563; *Steinberger v. State*, 35 Tex. Crim. 493; *Davis v. State*, 65 Tex. Crim. 429; *State v. Schweitzer*, 111 Pac. 130; *State v. Pierce*, 123 N. C. 745.)

An erroneous sentence or an erroneous judgment is not ground for release upon *habeas corpus*. This court will not upon *habeas corpus* review errors of law or mere irregularities which may have taken place upon the trial of a case. The writ of *habeas corpus* cannot be used to serve the purpose of an appeal or writ of error. (*Ex Parte Winston*, 9 Nev. 71; *Ex Parte Edgington*, 10 Nev. 215; *Ex Parte Crawford*, 24 Nev. 91; *Ex Parte Tani*, 29 Nev. 385; *Ex Parte Gafford*, 25 Nev. 101; *Ex Parte Twohig and Fitzgerald*, 13 Nev. 302.)

By the Court, NORCROSS, C. J.:

This is an original proceeding in *habeas corpus* presenting but one question, to wit, the jurisdiction of the court below to render the particular judgment upon which petitioner was sentenced to be confined in the county jail of Nye County.

Petitioner was proceeded against for the crime of libel under the provisions of section 163 of the crimes and punishments act (Rev. Laws, 6428), as amended by Stats. 1915, p. 423. So much of the section as involves the question presented in this proceeding reads:

"A libel is a malicious defamation. \* \* \* Every person, \* \* \* convicted of the offense, shall be fined in a sum not exceeding five thousand dollars, or imprisonment in the county jail not exceeding one year, or in the state prison not exceeding five years. In all prosecutions for libel \* \* \* the jury shall have the right to determine the law and the fact."

The trial resulted in a verdict of the jury in the following form:

"We, the jury in the above-entitled cause, find the defendant, W. W. Booth, guilty of a gross misdemeanor."

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Judgment was entered upon the verdict, reciting among other matters, that the verdict of the jury found the defendant "guilty of a gross misdemeanor, to wit, libel as charged in said information."

No attack is made upon the form of the judgment. It is the contention of counsel for petitioner that the judgment is not responsive to the verdict; that the verdict upon its face shows that defendant was not convicted of an offense embraced in the charge alleged in the information, and hence the court was without jurisdiction to enter judgment thereon.

It is the contention of counsel for respondent in this case that the section of our statute defining and punishing libel, by the provisions relating to punishments which may be imposed, subdivides libel into two grades or degrees, one of which is made a felony, and the other of which is made a gross misdemeanor; that it was within the province of the jury to determine the grade or degree of offense; and that the language of the verdict, when read in connection with the information and in the light of statutory provisions, was entirely proper.

1-6. It is a well-settled proposition of law that in a criminal case tried by jury the judgment must follow and be supported by the verdict; in other words, that if the verdict of the jury is not such as is determinative of the issues made by the plea of not guilty, it is a void verdict, and the court has no jurisdiction to enter judgment thereon. If a verdict of a jury finds a defendant guilty of an offense other than that charged in the indictment, it is clearly void, and a judgment based thereon is likewise void. The cases of *Ex Parte Dela*, 25 Nev. 346, 60 Pac. 217, 83 Am. St. Rep. 603, *Ex Parte Harris*, 8 Okl. Cr. 397, 128 Pac. 156, and *Mai v. People*, 224 Ill. 414, 79 N. E. 633, cited by counsel for petitioner, are based on this principle of law.

By section 366 of the criminal practice act (Rev. Laws, 7216) it is provided that:

"A verdict upon a plea of not guilty shall be either 'guilty' or 'not guilty,' which imports a conviction or acquittal of the offense charged in the indictment."

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By section 368 (Rev. Laws, 7218) it is provided:

"Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

See, also, Rev. Laws, 7244.

By section 371 (Rev. Laws, 7221) it is, among other things, provided:

"If the jury render an informal verdict, the court may direct them to reconsider it, and it shall not be recorded until it is rendered in some form from which it can be clearly understood what the intent of the jury is."

By section 372 (Rev. Laws, 7222) it is, among other things, provided:

"But no judgment of conviction can be given unless the jury find expressly against the defendant upon the issue."

It will be seen from the statute above quoted that a verdict finding a defendant "guilty," without more, is sufficient, unless the crime charged is distinguished into degrees when the degree of guilt must be found also. When such a verdict is returned, the jury may be said to have found expressly against the defendant upon the issue. It is not necessary under the statute that a verdict to be sufficient should specify the crime charged, no more than it is necessary for a defendant to specify the crime charged when entering a plea of "guilty" or "not guilty." (Rev. Laws, 7106, 7107, 7216.) A verdict of "guilty," says the statute (Rev. Laws, 7216), "imports a conviction or acquittal of the offense charged in the indictment."

In determining the effect of the words "of a gross misdemeanor" following the word "guilty" in the verdict it will be necessary to determine the nature of the crime of libel. It is one of the few crimes to be found in our statutes which may be punished either as a felony or as a gross misdemeanor.

In the case of *State v. McCormick*, 14 Nev. 347, this court dismissed an appeal from a judgment imposing a jail sentence upon the ground that this court had no jurisdiction upon an appeal in a criminal case unless the same amounted to a felony. The statute under which the defendant was convicted in the McCormick case

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provided that upon conviction the defendant should "be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding two years, or by both such fine and imprisonment, as the court shall adjudge, and, if such imprisonment shall be for a period exceeding six months, the same shall be in the state's prison." (Stats. 1879, p. 121.) Referring to the provisions of this statute, this court, speaking through Hawley, J., said:

"The charge in the indictment is of a felony; but under the provisions of the statute the offense may be punished either as a felony or a misdemeanor. The attorney-general contends that the punishment inflicted by the court determines the grade of the offense. *People v. Cornell*, 16 Cal. 187, and *People v. Apgar*, 35 Cal. 389, are cited in support of this position. The principles decided and the conclusion reached in these cases authorize the dismissal of the appeal herein. \* \* \*

"If punished as a felony, that is the 'offense charged,' from which an appeal may be taken. If punished as a misdemeanor, that is the 'offense charged,' and an appeal will not lie."

The doctrine of the McCormick case was again affirmed by this court in *State v. Quinn*, 16 Nev. 89. In the case of *People v. Cornell*, 16 Cal. 187, cited by this court in the McCormick case, the Supreme Court of California uses this expression:

"In other words, this sort of assault is a felony or misdemeanor, according to the facts, and we must take the judgment of the court affixing the punishment as determining the class to which the particular offense charged belongs."

The Apgar case, in 35 Cal. 389, cited *supra*, affirms the decision of the court in *People v. Cornell*, *supra*.

In the case of *Gandy v. State*, 10 Neb. 243, 4 N.W. 1019, the Supreme Court of Nebraska also adopted the rule in the Cornell case. The court in the Gandy case, among other things, said:

"Besides, if it were intended by section 5441 to enable the court, in affixing the punishment for a given offense, in its discretion to consider it either as a felony or as a

mere misdemeanor, then we think the rule adopted by the supreme court \* \* \* in the case of *People v. Cornell*, 16 Cal. 187, should be applied, viz: That the punishment actually inflicted must determine the grade of that offense. This rule certainly has the merit of being both just and humane."

In the Gandy case the Nebraska court was considering the question whether a defendant convicted of an offense punishable both as a felony and as a misdemeanor, the judgment entered being as for a misdemeanor, could be said to have lost his civil rights which follows upon conviction for a felony. The court held in the Gandy case that such civil rights were not forfeited.

It is contended by counsel for the petitioner that the McCormick and Quinn cases have no bearing upon the question of the jurisdiction of the court to pass sentence upon the verdict rendered in the case at bar. It is true that those cases were determining the ultimate question of the jurisdiction of this court under the constitutional provisions limiting the right of appeal to this court to cases of felony. But, in order to hold this court to be without such jurisdiction, it was necessary to hold as a preliminary proposition that the respective statutes "charged" two grades of offenses. The language of the California court in the Cornell case was also quoted with approval to the effect that the respective crime charged was "according to the facts." We think there is no other construction to be placed upon these decisions than a holding that in a crime providing for punishments of the character prescribed in our libel statute an indictment or information charges two grades of the same offense, one a felony, and one a gross misdemeanor.

Relative to the contention of counsel for the state that libel is distinguished into degrees, little authority can be found. Cyc. says:

"In criminal law the term [degree] denotes a particular grade of crime more or less culpable than another grade of the same offense." (13 Cyc. 766, citing *Rapalje & L. L. Dict.*)

The courts seem never to have had occasion to consider

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whether a statute like the one in question should be regarded as distinguished into degrees, and hence a duty imposed upon the jury to determine the particular degree. So far as the definition given is concerned, it is as applicable to a statute of the character in question as it would be if that statute divided the crime into first and second degrees, and punished the former as a felony, and the latter as a gross misdemeanor. The precise determination of the question here, however, we think unnecessary, in view of the law peculiar to prosecutions for criminal libel. Whether a certain libel is a felony or a misdemeanor is either a question of law or a question of fact, and it is the province of the jury to determine both these questions. (Rev. Laws, 6428, 7196.) It is therefore proper, if not essential, that the jury in libel cases determine not only the guilt but the degree or grade of guilt.

If the verdict in this case had been "guilty of libel of the grade or degree of a gross misdemeanor," we can hardly see where there could be room to question its sufficiency. It is contended, however, that, because many offenses come within the class of gross misdemeanor, it cannot be ascertained from the verdict in question what gross misdemeanor was intended. If in determining the sufficiency of a verdict courts must look exclusively to the verdict, there would be much force in the contention of counsel for petitioner. A verdict of "guilty," which our statute says is sufficient in cases other than those divisible into degrees, by itself would be unintelligible, but reference may be had to the indictment or information in making up the judgment.

It is well settled, at least by the weight of modern authority, that a verdict will not be held void for uncertainty if its meaning can be determined by reference to the record, particularly the indictment or information. (*People v. Tierney*, 250 Ill. 515, 95 N. E. 447; *Mai v. People*, 224 Ill. 418, 79 N. E. 633; *Donovan v. People*, 215 Ill. 523, 74 N. E. 772; *State v. Gregory*, 153 N. C. 646, 69 S. E. 674; *State v. Braden*, 78 Kan. 576, 96 Pac. 840; *Ex Parte McLean*,



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84 Kan. 852, 115 Pac. 647, 35 L. R. A. n. s. 653; *Arnold v. State*, 51 Ga. 144; *Doolittle v. State*, 93 Ind. 272; *Burgess v. State*, 33 Tex. Cr. R. 9, 24 S. W. 286; *Howell v. State*, 10 Tex. App. 298; *Hoback v. Com.*, 28 Grat. 922; *Washington v. State*, 55 Fla. 194, 46 South. 417; *Albritton v. State*, 54 Fla. 6, 44 South. 745; *Bunch v. State*, 58 Fla. 9, 50 South. 534, 138 Am. St. Rep. 91; *State v. DeWitt*, 186 Mo. 61, 84 S. W. 956; *State v. Grossman*, 214 Mo. 233, 113 S. W. 1074; *State v. Jefferson*, 120 La. 116, 44 South. 1004; *Hines v. State*, 48 Tex. Cr. R. 24, 85 S. W. 1057; *People v. Holmes*, 118 Cal. 444, 50 Pac. 675; 12 Cyc. 690.)

In *People v. Tierney*, *supra*, the Supreme Court of the State of Illinois said:

"A verdict is not to be construed with the same strictness as an indictment, but it is to be liberally construed, and all reasonable intendments will be indulged in its support, and it will not be held insufficient, unless, from necessity, there is doubt as to its meaning. (*People v. Lee*, 237 Ill. 272, 86 N. E. 573.) The rule is that, in determining the sufficiency of a verdict, and a judgment of conviction based thereon, the entire record will be searched, and all parts of the record interpreted together, and a deficiency at one place may be cured by what appears at another. (*People v. Murphy*, 188 Ill. 144, 58 N. E. 984.) Under the habitual criminals act it was only necessary to set out in the indictment the former conviction of the plaintiff in error in apt words, which it is conceded was done in this case, and, as the evidence heard upon the trial is not incorporated into the record, this court clearly is bound to presume, in consideration of the verdict of the jury finding the plaintiff in error guilty, and the judgment of conviction based thereon, that the trial court confined the evidence to the issues involved upon the trial, and that the finding of the jury that the plaintiff in error had been 'convicted of robbery and had served a term in the penitentiary of this state for such offense,' referred to the previous robbery charged in the first paragraph of the second count of the indictment, and not to some other robbery which was entirely

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foreign to the issues involved in the trial of the case then on hearing before the court and jury."

In *Ex Parte McLean*, *supra*, the Kansas Supreme Court said:

"A verdict of guilty, which can apply to but one of the offenses or degrees charged in the information sufficiently complies with the statute requiring a specification of the degree, although its language may also fit other offenses or degrees that are not included in the charge. \* \* \*

"There are manifest reasons why a judgment should be required to be complete in itself that do not apply in the case of a verdict—why the same fullness of expression is not required in the verdict, upon which the court itself is to act, as in the judgment, under which the penalty of the law is to be inflicted. Here the court interpreted the verdict in the light of the information, and found that the defendant had been convicted of that kind of grand larceny the extreme penalty for which is confinement for five years. This finding was recited in the judgment, which ordered a punishment in accordance therewith."

In *Arnold v. State*, *supra*, the Supreme Court of the State of Georgia said:

"Verdicts are to have a reasonable intendment and to receive a reasonable construction, and are not to be set aside unless from necessity. (Code, 3561; *Wood v. McGuire*, 17 Ga. 361, 63 Am. Dec. 246; *Gardner v. Kersey*, 39 Ga. 664, 99 Am. Dec. 484.) And this is the general spirit of the code, as well as the expression of the more universal tendency of jurisprudence towards freedom from that slavish adherence to technical nicety which is the reproach of the common law."

In *Burgess v. State*, *supra*, the Texas Court of Criminal Appeals, referring to the verdict under consideration in that case, said:

"The verdict of the jury, when considered in connection with the charge in the indictment, and instructions given by the court to the jury, is not vague, but is very certain."

Upon the subject of verdicts generally the following excerpt from Bishop's New Criminal Law, vol. 1, sec. 1005, is instructive:

"The language of the verdict, being that of 'lay people,' need not follow the strict rules of pleading, or be otherwise technical. Whatever conveys the idea to the common understanding will suffice. And all fair intendments will be made to support it."

This is substantially our statutory requirement, quoted *supra*, that the verdict be "rendered in some form from which it can be clearly understood what the intent of the jury is."

This case, in some of its features, presents a somewhat novel situation and it has been necessary to determine it upon an application of established legal principles without the aid of precedents precisely in point. We have very carefully considered the numerous citations of respective counsel, a few of which only it will be profitable to refer to specially. In considering these cases, it is important to bear in mind that, with but two exceptions, they were all upon appeal or writ of error, where the province of the court is quite different than upon *habeas corpus*, where the question is confined to one of jurisdiction. A verdict may be so erroneous as to warrant a reversal, but not so erroneous as to be entirely void. In most instances the cases do not expressly decide whether the particular verdict was held void or merely erroneous.

The cases cited may be regarded as falling within certain general classifications. Those holding that a verdict for an offense different from that charged in the indictment is void have already been alluded to (see citations *supra*). This case is clearly not within that class; for the words "gross misdemeanor" do not describe a particular or generic offense, but define simply a general class or grade of offense, determined by the limit fixed by law upon the punishment which may be imposed. (Rev. Laws, 6266.)

Another class of cases cited deals with verdicts finding a defendant guilty of certain specified acts, omitting certain other acts charged which are essential to a complete

offense. The following cases cited are within this class: *Webber v. State*, 10 Mo. 5; *Donovan v. People*, 215 Ill. 520, 74 N. E. 772; *People v. Lee*, 237 Ill. 272, 86 N. E. 573. Cases within this class are clearly not in point in the case at bar. Besides, such verdicts are not aided by a reference to the record.

Cases cited which may be classified as holding verdicts too vague, indefinite, uncertain, or inconsistent to support the judgment are the following: *Sharff v. Comm.*, 2 Bin. (Pa.) 514; *Miles v. State*, 3 Tex. App. 58; *Howell v. State*, 10 Tex. App. 298; *Senterfit v. State*, 41 Tex. 188; *Com. v. Smith*, 2 Va. Cas. 327; *State v. Weeks*, 23 Or. 3, 34 Pac. 1095; *People v. Ah Gow*, 53 Cal. 627; *People v. Tilley*, 135 Cal. 61, 67 Pac. 42; *Wells v. State*, 116 Ga. 87, 42 S. E. 390. If the verdict in the case at bar is invalid, it is because it is within this classification. Many of the cases cited and included in this classification were decided at a time when courts held technicalities in higher reverence than comports with modern jurisprudence.

The *Sharff* case, *supra* (decided in 1810), holding that the court could not say from a verdict that the defendant is "guilty of writing a bill of scandal" that it found him guilty of the offense for which he was indicted, because "a bill is very different from *the* bill," is cited in support of the contention that the verdict in this case, "guilty of a gross misdemeanor," is indefinite, as not showing what one of numerous gross misdemeanors in our statutes was intended. In the *Sharff* case the court was of the opinion:

"It would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the.'"

If the indictment had charged two separate bills of scandal, there might now be considered force in this decision, but it only charged one. Under the modern rule of interpreting verdicts by a reference to the charge in the indictment or information, this citation is only of historical value. A more modern authority, *People v. McFadden*, 65 Cal. 446, 4 Pac. 421, determined a verdict, "guilty of an assault to murder," sufficient. See, also, 1 Corpus Juris, 1.

In the case of *Howell v. State*, 10 Tex. App. 298, a verdict finding the defendant "guilty of a misdemeanor" was

held insufficient upon authority of the case of *Senterfit v. State*, 41 Tex. 188. In the latter case the verdict read:

"We, the jury, find the defendant guilty of a misdemeanor in driving from the county of Lampasas one cow brute, and assess his fine at \$18."

The court said:

"We think the verdict was clearly insufficient. It does not sufficiently appear that the misdemeanor of which the jury find the defendant guilty is that charged in the indictment, or that the cow which they find him guilty of driving from Lampasas County was one of his own cattle or one of those charged in the indictment."

It is difficult from the entire opinion to determine to what extent this opinion is in point, but, assuming it to be in point, it is the only case cited, other than the Sharff case, *supra*, which might be regarded as supporting the contention of counsel for petitioner. Some of the early Texas cases (this case was decided in 1874) may be classed as quite technical. As late as 1883, in *Wool-dridge v. State*, 13 Tex. App. 443, 44 Am. Rep. 708, the court held a verdict reading "guilty of murder in the first degree" insufficient and remanded the case for a new trial. There is ample modern authority for holding that an apparent misspelling of a word does not vitiate a verdict.

In *Miles v. State*, 3 Tex. App. 58 (decided in 1877), the indictment charged the theft of hides of the value of \$24. The verdict was "guilty of felony." It would appear from the opinion in this case that to constitute theft a felony the jury must find the value of the property stolen to be of a value of more than \$20. The opinion does not specifically criticize the use of the word "felony" in the judgment. The opinion concludes:

"For the reason that the verdict does not specifically find the accused guilty of the theft of property of the value of \$20 or over, the judgment must be reversed, and the cause remanded for a new trial."

In *Wells v. State*, *supra*, the court was considering a verdict reading "guilty of misdemeanor," returned upon an indictment charging "hog-stealing." The statute made

the offense a felony, but it was provided that in such cases, if the jury made a recommendation that the offense be punished as a misdemeanor, the presiding judge, if he approved the recommendation, could impose sentence as for a misdemeanor. The court held that, under this statute, the jury could not reduce the offense to a misdemeanor even by a recommendation that punishment be imposed as such. "It is clear," says the court, "that the jury \* \* \* could not legally find the accused guilty of a misdemeanor." The statute in question in the Wells case is essentially different from that involved in the case at bar. Under the Georgia statute the jury was held to have no power other than to find a verdict of guilty with or without a recommendation, and that the presiding judge had no option to punish as for a misdemeanor in the absence of such recommendation and its approval.

The Wells case, *supra*, is referred to in *Smith v. State*, 117 Ga. 16, 43 S. E. 440, where a verdict "guilty of misdemeanor" was also returned. The following excerpt from the opinion in the Smith case is instructive:

"In that case [referring to the Wells case] the charge against the accused was a felony, and the only lawful verdicts which could have been found were guilty, or not guilty, or guilty with a recommendation that the accused be punished as for a misdemeanor. For this reason that case is not absolutely binding as authority in the present case. The presentment in the present case, as will appear from the statement of facts, was of such a character that there could have been any one of five verdicts rendered thereon, a general verdict of guilty, which would have resulted in the accused being punished as for a felony, a special verdict of guilty, with a recommendation that the accused be punished as for a misdemeanor, a verdict of guilty of larceny from the house, a verdict of guilty of simple larceny, and a general verdict of not guilty. Verdicts are to have a reasonable intendment, should receive a reasonable construction, and are not to be avoided except from necessity. (Civil Code, sec. 5352.) Can this rule be so applied in the present case as to show with reasonable certainty what was intended by the jury as

their finding? It is clear, of course, that the jury intended to convict the accused of something; but of what? Did they intend to convict him of the felony and recommend that he be punished as for a misdemeanor? Or did they intend to convict him of larceny from the house, or of simple larceny? Let it be conceded that the jury intended to acquit the accused of the felony, and convict him of one of the misdemeanors charged in the presentment. Even if we reach this point, it is impossible to tell from the verdict which misdemeanor it was to apply to. It will not do to say that this is immaterial, even if the punishment, both as to penalty and costs, in each case would be the same. The judge has a discretion in regard to the punishment to be inflicted, and the accused is entitled to have the verdict specify the particular offense of which he has been guilty, in order that the judge may take this into consideration in imposing sentence. A lighter punishment might have been inflicted had the conviction been for simple larceny than for larceny from the house. Under such a verdict it is a mere matter of speculation as to what was intended; and the only proper direction to give the case is to arrest the judgment."

There is some inference at least in the decision in the Smith case that, had the charge embraced but one misdemeanor instead of two misdemeanors, the verdict would not have been held insufficient.

In none of the cases cited has it been held that the verdicts were void or defective merely because of the wording "guilty of felony," "guilty of misdemeanor," or "guilty of a misdemeanor," as the case may be, merely because of the use of the words "felony" or "misdemeanor," except possibly the Texas court in the Senterfit case, *supra*, intended to hold that the use of the indefinite article "a" in connection with the word "misdemeanor" rendered the verdict too indefinite, the same as was held by the early Pennsylvania court in the Sharff case heretofore considered. If so, that case is not in accord with the modern Texas doctrine of construing verdicts, mentioned in the Burgess case, *supra*.

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Two cases cited by counsel for respondent, may be referred to as illustrative of verdicts containing language apparently qualifying the verdict, but rejected by the court upon a reference to the instructions given in the respective cases, as meaningless or surplusage. In *Territory v. Muniz*, 17 N. M. 131, 124 Pac. 340, a verdict reading, "guilty of manslaughter, 3 degree," was held a good verdict for manslaughter, the expression "3 degree" being rejected as meaningless, there being no degrees in manslaughter. In *People v. Holmes*, 118 Cal. 444, 50 Pac. 675, cited *supra*, a verdict in part reading, "find a verdict of 'involuntary manslaughter,' 'not a felony,' as charged and laid down by the court under the head of involuntary manslaughter," was held a good verdict for manslaughter, the inconsistent words "not a felony" being rejected "as surplusage."

It is suggested by counsel for respondent that these cases are authority for holding the words "of a gross misdemeanor" surplusage in this case, in the event it is determined this use was improper. In the view we take of the verdict, it is unnecessary to consider this suggestion.

Considering the verdict in connection with the information and the law governing the crime of criminal libel, we are not warranted, we think, in holding it void. When reference is had to the information, it is "in form from which it can be clearly understood what the intent of the jury is." (Rev. Laws, 7221, quoted *supra*.) It was the province of the jury to determine the grade of the offense "according to the facts" (*People v. Cornell, supra*), and this is what the jury clearly intended to do by the use of the words "of a gross misdemeanor." If we are permitted to refer to the record filed on the part of the state, it would appear therefrom that this verdict was precisely in accordance with the instructions given. But, even if that record is not properly before us, and we are not prepared to say that it is not, the rule that all intendments and presumptions must be indulged in in favor of a judgment upon collateral attack is applicable here.



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As expressed in authorities cited *supra* (*People v. Tierney*; Bishop's New Criminal Law), verdicts are not construed with the same strictness as an indictment or information. This court, in *State v. Lovelace*, 29 Nev. 43, 83 Pac. 330, in considering the rule governing the interpretation of indictments, after quoting the statutory provisions governing indictments, said:

"The foregoing enactments show that it was the intention of the legislature of Nevada that in construing indictments the courts should not indulge in a too exact and overnice view of language, but that certainty to a common intent was all that should be required. \* \* \* The sections of the statute above quoted show the legislative intent was that the courts of the state should give interpretations liberal to sustain rather than rigid to overthrow indictments, when \* \* \* substantial rights of defendants are not thereby prejudiced."

In *State v. Hughes*, 31 Nev. 270, 102 Pac. 562, this court, in considering an indictment, questioned for the first time upon an appeal, said:

"It will not be held insufficient to support the judgment, unless it is so defective that by no construction, within the reasonable limits of the language used, can it be said to charge the offense for which the defendant was convicted."

Also in *State v. Raymond*, 34 Nev. 203, 117 Pac. 17, this court said:

"It has been the tendency of courts in recent years to be less technical than formerly in construing indictments, especially so where no demurrer was interposed to the indictment and an opportunity afforded to cure the defect prior to trial."

See, also, *State v. Kruger*, 34 Nev. 302, 122 Pac. 483; Rev. Laws, 7302, 7469.

We have considered the important questions of law presented, and reviewed some of the authorities cited, as well as others, at considerable length, because some of the questions are of original impression and establish a precedent in this court.

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Points decided

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While it has been held by former decisions of this court that an appeal will not lie except in cases of felony, it may be worthy of note here that a similar provision in the first constitution of California was changed by the constitution of 1879, so as to permit appeals in all cases prosecuted by indictment or information.

As the verdict is not void, the judgment was not in excess of jurisdiction. Therefore it is ordered that petitioner surrender himself into the custody of the sheriff of Nye County in pursuance of the judgment from the confinement upon which he was released upon bail pending the hearing on this proceeding, and that upon his so surrendering himself his bail be exonerated.

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[No. 2104]

IN THE MATTER OF THE ESTATE OF OTTO HARTUNG,  
DECEASED.

[155 Pac. 353]

## 1. WILLS—CONSTRUCTION—INTENTION OF TESTATOR.

The cardinal rule in the interpretation of wills is to ascertain the intention of the testator.

## 2. WILLS—CONSTRUCTION OF DEVISE—INCOME OF ESTATE.

Under a will devising the residue of an estate to the Independent Order of Odd Fellows, the income therefrom to be paid over by the executors and trustees annually, if within five years from testator's death the order established a home for orphans in a certain place, to be known by a certain name, with devises of the estate over in the contingency that the order should not accept such condition, it was the testator's intention that the order, if it established such a home within such time, should receive only the income of the estate.

## 3. WILLS—CONSTRUCTION—TRUST—INCOME.

Under such will, in which the devise was unlimited as to time, the rule that a gift of the income of a fund without limit as to time will pass the fund itself did not apply, as it was the testator's intention, in case the order did not build the home, to create an active trust, the trustees to manage the *corpus* of the trust fund and pay over the proceeds thereof annually to the order as long as it maintained the home.

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Argument for Appellant

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## 4. WILLS — CONSTRUCTION — “RESIDUE” — “RESIDUARY LEGATEE” — “RESIDUARY BEQUEST.”

Under such will, the order was not a “residuary legatee,” as the term “residuary bequest” means that the residue of an estate is bequeathed to a person absolutely, and as there can be but one “residue” of an estate, meaning what is left after the payment of the debts and general legacies and the satisfaction of other specific gifts.

## 5. WILLS—RESIDUARY BEQUEST—INCOME.

A residuary bequest contingent in terms generally carries the intermediate income, which is not disposed of, but accumulates.

## 6. APPEAL AND ERROR—PRESUMPTION—RECORD.

Where the executors of an estate had made two reports before their final report, each of which was proved and settled by the court, and there was no evidence in the record that the estate could have been settled sooner with advantage, the court would not presume such to have been the fact.

## COSTS AND ATTORNEYS' FEES

## 1. COSTS—PROCEDURE FOR RETAXING IN SUPREME COURT.

Under rule 6, paragraph 3, Rules of Supreme Court, objections to cost bill must be filed with the clerk of the court and heard and settled by such clerk. From the ruling of the clerk an appeal may be taken to the court. The court will not consider objections to a cost bill except upon appeal from the decision of the clerk.

## 2. ATTORNEYS' FEES.

No question of attorneys' fees being presented by the record, the matter of an allowance for such fees to counsel for appellant is entirely within the province of the trial court.

**APPEAL** from Second Judicial District Court, Washoe County; *John S. Orr* and *R. C. Stoddard*, Judges.

In the Matter of the Estate of Otto Hartung, Deceased. From a decree of distribution of the estate and from an order overruling a motion to modify such decree, the Grand Lodge of the Independent Order of Odd Fellows of the State of Nevada appeals. Order and decree **affirmed**.

*Thomas E. Kepner* and *C. E. Mack*, for Appellant:

The bequest of the income of this estate, unlimited as to time, was, in the intention of the testator, as well as in its legal effect, an absolute and unqualified bequest of the entire *corpus* or residue to appellant. (*Smith v. Gates*, 2

## Argument for Appellant

Root, 532, 1 Am. Dec. 89; *Garrett v. Rex*, 6 Watts, 14, 31 Am. Dec. 447; *Manning v. Craig*, 3 Green Ch. 436, 41 Am. Dec. 739; *Craft v. Snook's Executors*, 2 Beas. Ch. 121; 40 Cyc. 1550; *Busby v. Busby*, 137 Iowa, 57, 114 N.W. 559; *Wellford v. Snyder*, 137 U. S. 521; Schouler on Wills and Administration, 507; 2 Redfield on Wills, 329; *Snyder v. Baker*, 5 Mackey, 443; *Chase v. Chase*, 132 Mass. 473; *Angell v. Springfield Home*, 157 Mass. 241; *Hussey v. Sargent*, 116 Ky. 52, 75 S. W. 211; *Baldwin v. Tucker*, 61 N. J. Eq. 412, 64 N. J. Eq. 333, 48 Atl. 544; *Zimmer v. Sennett*, 134 Ill. 505; *Hyde v. Rainey*, 233 Pa. St. 540; *Thompson's Estate*, 234 Pa. St. 82; *Rogers's Estate*, 245 Pa. 206.)

Appellant is entitled to use the intermediate income accruing between the death of the testator and the date when the home was established and the income accruing annually thereafter for the purpose of maintaining the home. "A general residuary bequest, contingent in terms, carries the intermediate income, which is not undisposed of, but accumulates." (40 Cyc. 1569; *State v. Stiney*, 78 Conn. 397, 62 Atl. 621; *Hartford v. Haines*, 67 Md. 240, 9 Atl. 540; *Saibert v. Miller*, 55 N. Y. Supp. 593; *Drayton v. Rose*, 7 Rich. Eq. 329, 64 Am. Dec. 731; *Leissenring's Estate*, 85 Atl. 80; Jarman on Wills, 6th ed. 1046; Hawkins on Wills, 57.)

The conditions imposed by the testator were accepted by the grand lodge. A binding and enforceable obligation was then created. (*Maxey v. City of Oshkosh*, 128 N. W. 899.) The equitable title to the residuary corpus and income of the estate vested in appellant at the death of the testator, and on accepting the bequest on the terms stated appellant became entitled to the legal title thereto. (*Jones v. Habersham*, 107 U. S. 174; *Appeal of Beardsley*, 77 Conn. 705, 56 Atl. 664; *Crerar v. Williams*, 145 Ill. 549, 34 N. E. 471; *In Re Roche*, 104 N. Y. Supp. 601; *Maxey v. City of Oshkosh*, 128 N. W. 899.)

The account filed by the executors on October 14, 1914, and approved November 9, 1914, was a final account within the meaning of section 6072, Revised Laws, and the trial court should have so held and decreed distribution of the estate on the petition of the appellant. (Rev.

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Laws, 6060, 6061, 6072; *Estate of Sheid*, 129 Cal. 172; *Clark v. Sandroch*, 77 Atl. 377; *Thomas v. Lambie's Estate*, 70 N. W. 442; *Vaughn v. Hines*, 87 N. C. 455; *Roach's Estate*, 92 Pac. 121; Church's Probate Laws, 1200.)

*Cheney, Downer, Price & Hawkins*, for Respondents:

Even if appellant has complied with the conditions of paragraph 10 of the will, in no event is it entitled to receive more than the income of the estate, to be paid to it annually by the executors and trustees named in the will. The intention of the testator, as declared by the will itself, must prevail. If a general purpose and intention conflicts with a particular, the former prevails. (Page on Wills, secs. 461-463.)

Where the will imposes an active duty upon a trustee, and devises the income only, the trustee is entitled to the possession of the property from which the income is derived. (*Mackay v. Mackay*, 40 Pac. 558; *Appeal of Holt*, 19 Atl. 588; *Winn v. Bartlett*, 45 N. E. 752; *Appeal of Eichelberger*, 19 Atl. 1006; *Phelps v. Phelps*, 10 N. E. 445.)

The bequest to appellant is upon a condition precedent. Courts have no artificial rules of construction which require them to declare a gift absolute and vested, if it appears from the language of the will that the testator intended it should be contingent. (*Phayer v. Kennedy*, 48 N. E. 828; *Bennett v. Bennett*, 75 N. E. 339; *Robinson v. Martin*, 93 N. E. 489; Page on Wills, 772; 18 Am. & Eng. Ency. Law, 2d ed. 732; *Finlay v. King*, 3 Pet. 374; *Markham v. Hufford*, 82 N. W. 222; *In Re Paulson's Will*, 107 N. W. 484; 1 Kent Com. 202; 4 Words and Phrases, 1157; *In Re McClellan's Estate*, 70 Atl. 737; 2 Jarmin on Wills, 1111, 1220.)

By the Court, COLEMAN, J.:

This is an appeal by the Grand Lodge of the Independent Order of Odd Fellows of the State of Nevada from the decree of distribution made in the above-entitled estate, and from an order overruling a motion to modify said decree.

The controversy grows out of the construction of the

will of Otto Hartung, deceased. Those portions of the will which are essential to an intelligible understanding of the questions involved read as follows:

"Eighth—In place of the provisions contained in paragraph 6, I give and bequeath to my sister Amalia Genkell of 14a Langenstrasse, Ilversgehoven, Germany, the sum of one hundred (\$100.00) dollars, and in addition thereto the sum of twenty-five (\$25.00) dollars monthly dating from my death during the remainder of her natural life, and I direct that the said monthly payment of twenty-five (\$25.00) dollars be transmitted to her by my executors, and after their discharge by the trustees hereinafter named, and without deduction for cost of exchange and transmittal. \* \* \*

"Tenth—I give, devise, and bequeath all the residue of my estate, both real and personal, as follows:

"(A) To the Independent Order of Odd Fellows of the State of Nevada the income from my estate to be paid over to them by my executors and trustees annually, if within five years from the date of my death the said Independent Order of Odd Fellows of the State of Nevada, does establish a home worthy of its name, for orphans and foundlings near Reno, Nevada, and to be known by the name of the 'Royal D. Hartung Home for Orphans and Foundlings' but if the Independent Order of Odd Fellows of Nevada does not accept the provision of this bequest, within the time herein mentioned, then—

"(B) I give and bequeath all my estate to the board of school trustees of Reno, Nevada, provided that they will build and establish within the Reno school district an industrial school, the land and building to cost not less than twenty-five thousand (\$25,000.00) dollars. The cost of this land and the building shall be paid by the taxpayers of the Reno school district. The said school shall be known as the 'Royal D. Hartung Industrial School,' and my estate shall be excepting where already invested in safe, and good income-bearing bonds, reduced to cash and loaned out upon first-class real estate security, the income thereof to be considered as an annual

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endowment fund and the income thereof only to be expended annually by the Board of Trustees for the purpose of paying the teachers, or supplying facilities for instruction in the Royal D. Hartung Industrial School. If, after a reasonable time has elapsed not exceeding seven years after the date of my death, the city of Reno fails to accept the provisions of this bequest, then—

“(C) I give and bequeath all my estate, both real and personal not otherwise herein devised, to the board of regents of the State University of Nevada, that my estate be reduced by them to cash, or good income-bearing securities, and loaned out upon first-class real estate security and the income thereof alone to be expended annually, or at such other period as such trustees may deem best in assisting poor, worthy students, of high moral character, in obtaining an industrial school or industrial college education in the city of Reno, and I expressly direct that the principal of said gift to said board of regents be kept intact and that the fund be kept a perpetual fund to be known as the ‘Royal D. Hartung Industrial Education Fund’; and I further authorize a majority of the members of said board of regents to act with respect to the disposal of said income, or in any matter respecting said fund or the income thereof, said regents to be and act as trustees of said fund without pay.

“Eleventh—I nominate, constitute, and appoint C. T. Bender, now cashier of Washoe County Bank of Reno, Nevada, J. E. Stubbs, president of the State University of Nevada, and Edward Barber, grocer of Reno, Nevada, the executors of this my last will and testament; a majority of whom may act in the execution of the provisions of this will; and I do hereby authorize and direct that in the event of the death of any of the said executors the surviving executor or executors may act in the execution of this will as fully and legally as could the three hereby appointed. And that the said executors shall act as trustees without pay excepting as hereinbefore provided, and that the survivors shall have the

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power of appointing the successors of any one of such executors or trustees, in case of death, or refusal or inability to act, subject to the approval of the judge of the district court at Reno."

The lower court found:

That appellant had established a home in accordance with the terms of paragraph 10 of the will of the deceased, and ordered that all expenses of closing the estate be paid. "(4) That said estate is in a condition to be closed and the property set over and distributed to the trustees under said will. \* \* \*" That the executor of the estate "pay to the trustees of the Grand Lodge of the Independent Order of Odd Fellows the income of said estate since the 20th day of September, 1914, to wit, the sum of \$1,112.45, to be used by said trustees of said grand lodge for the maintenance and support of said Royal D. Hartung Home for Orphans and Foundlings," the date mentioned being that upon which the home was dedicated. "(5) That Edward Barber, as sole executor of said estate, deliver to said trustees (named in the will), \* \* \* and that the rest and residue of said estate, \* \* \* together with any income received since filing said final account, be and the same hereby is set over and distributed to \* \* \* trustees, and their successors in trust, for the uses and purposes set forth in the tenth paragraph of said will, subject to the claim of Amalia Henkel to a monthly allowance to be paid therefrom by said trustees since November 2, 1914, and as long as said Amalia Henkel shall live. \* \* \*

"It is further ordered that at least ten days prior to the 1st day of August of each year hereafter, and until the further order of this court, the trustees of said estate present to this court their account and report showing the income of said trust estate since the 1st day of August of the preceding year, together with the necessary expenses of the administration of said estate, and that said trustees of said estate, on or before the 1st day of August next following the filing of said



report, or at such times as the court may order, pay the net income of said trust estate for the preceding year as found by said court, to the trustees of the Grand Lodge of the Independent Order of Odd Fellows of the State of Nevada, for the purpose of maintaining said Royal D. Hartung Home for Orphans and Foundlings."

While several errors are assigned, we think we need consider only two of them, viz, first and second, which read as follows:

"First—The court erred in not deciding and decreeing distribution of all the principal, residue, or *corpus* of said estate to appellant to be held by it intact and the income arising therefrom from the death of the testator, January 21, 1910, and the establishment of the Royal D. Hartung Home for Orphans and Foundlings, to be used by appellant for the support and maintenance of said home.

"Second—The court erred in deciding that it was the intention of said testator expressed in his said last will and testament to separate the principal, residue, or *corpus* of said estate from the income arising therefrom and accruing thereon, and in decreeing distribution of such residue, together with income accruing between the death of the testator and the 20th September, 1914, to Edward Barber, C. R. Carter, and Theodore Clark."

1, 2. Bearing in mind that the cardinal rule of interpretation of wills is to ascertain the intention of the testator (40 Cyc. 1386), we will consider the point urged under the first assignment of error; that is, was it the intention of testator, in case appellant complied with the terms imposed upon it, that the residue of his estate should be turned over to appellant by the executor, or was it his intention, as claimed by the executor, that the residue of the estate should be distributed to the trustees, on condition that they pay over the income to appellant?

It is apparent at a glance that the paramount purpose of the testator was the establishment and maintenance of a permanent monument to the memory of his

## Opinion of the Court—Coleman, J.

son. So consumed was he with this idea and purpose, that he proposed three conditions in his will as an assurance that his wishes in this regard would be carried out. The medium through which he most desired the attainment of his aim was the Independent Order of Odd Fellows, for it was to that organization he offered the first inducement, as appears from paragraph 10 of his will. Should the organization named fail to avail itself of the opportunity offered, then the Reno school district or the State University, in turn, was to take the residue of the estate of the testator. Whichever of the organizations named should elect to benefit by the generosity of the testator must assume the burden going with it. Every advantage has its burden; for every pleasure we must pay the price. Testator named the advantage, and the burden which was to accompany it. Before appellant could acquire the benefits which might flow to it from the estate of the testator, it had to assume the burden, which it elected to do, and did do by establishing shortly before the expiration of the five-year period a home such as contemplated by the will of the testator.

To our mind, it is made clear by the will that it was the intention of the testator that, in case of appellant's electing to comply with the terms of paragraph 10 thereof, it should receive only the income of the estate, and not the *corpus* thereof. This is clear, for the reason that by paragraph 10 of the will testator provides that "the income from my estate to be paid over to them (I. O. O. F.) by my executors and trustees annually," while it is provided that the *corpus* of the estate should go to the Reno school district, or, in case of its failure to accept the bequest upon the terms mentioned, then to the board of regents of the State University. Surely great significance should be attached to the use of the word "income" in one instance, while in two others words implying an entirely different meaning are used. It shows that a different purpose was sought to be expressed.

3. It is the contention of appellant that the bequest to it is unlimited as to time, and that therefore it was an absolute and unqualified gift of the residue of the estate to appellant. Roper on Legacies (Ed. 1848) vol. 2, at page 1477, says on this point:

"But notwithstanding as a general rule the gift of interest and dividends standing by itself is a gift of the *corpus*, yet if from the nature of the subject, or the context of the will, it appear that the produce or interest of the fund was only intended for the legatee, the gift of the interest will not pass the principal."

The learned author then proceeds to review a number of English authorities sustaining his statement.

Cyc. lays down the rule as follows:

"A gift of the interest, income, or produce of a fund without limit, as to time, will pass the fund itself. And where a beneficiary is given an unrestricted interest in the income of a fund during his life, he may, in the absence of a statute, alienate it, either wholly or in part, before the time fixed for payment. If, however, it is the manifest intent of a testator to sever the product from its source, as where only a life estate in the income is given, a bequest of income will not carry an absolute estate in the principal." (40 Cyc. 1550.)

The case of *Watkins's Admr. v. Watkins's Exrs.* (Ky.) 120 S. W. 341, holds:

"Nor can we hold that a devise of the income of the bonds passed the bonds themselves. That rule applies only in the absence of anything in the will indicating a contrary intention. It does not apply when the testator plainly indicates that only a part of the *corpus* is to be used if necessary to make the devisee comfortable. (30 Am. & Eng. Ency. Law, 2d ed. p. 758.)"

In *Bentley v. Kauffman*, 86 Pa. 101, it is said:

"That a bequest of income or profits will carry an absolute estate in the principal or *corpus* of the estate in some cases is well settled; but the ground of the conclusion in such instances is that no contrary intent of the testator appears to sever the product from its source, and

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the fruits therefore carry with them that which bears them. \* \* \* Hence, when the intent clearly appears to carry the *corpus* or principal over to others, the words of the will must be permitted to have their proper force. Here the bequest of the interest only for life, connected with the provision immediately following, is inconsistent with an intent to confer the principal absolutely upon him."

In *House v. Ewen*, 37 N. J. Eq. on page 373, it is said:

"The general rule is that when the interest or produce of a legacy is given to, or in trust for, a legatee, or for the separate use of such legatee, without limitation as to continuance, the principal will be considered as bequeathed. But, notwithstanding, as a general rule the gift of interest and dividends, standing by itself, is a gift of the *corpus*, yet if from the nature of the subject, or the context of the will, it appears that the produce or interest of the fund only was intended for the legatee, the gift of the interest will not pass the principal."

Page on Wills, at section 599, lays down the rule in the following words:

"Within the limits of the rule against perpetuities, the law recognizes the right of the testator to dispose of the income of his property by will, and gifts of this sort are constantly upheld. And where testator manifests a clear intention, he may give the income separate and apart from the principal, so that the beneficiary has no interest whatever in the property from which the income is derived. The intention to separate the income from the principal is generally manifested either by creating an express trust or by limiting the interest to a life interest in the income only."

See, also, *Mackay v. Mackay*, 107 Cal. 303, 40 Pac. 558; *Wynn v. Bartlett*, 167 Mass. 292, 45 N. E. 752; *Appeal of Eichelberger*, 135 Pa. 160, 19 Atl. 1006, 1014; *Phelps v. Phelps*, 143 Mass. 570, 10 N. E. 452.

Thus it will be seen that after all is said the real question for the court to decide is: What was the intention of Otto Hartung, as expressed in his will? From a consideration of the consuming purpose which animated this man, and of the portion of the will which leaves to appellant "the income from my estate \* \* \* to be paid \* \* \* annually," in contrast with those portions of the will which provide that in case appellant did not build the home as contemplated the residue of the estate should go direct to whichever of the contingent beneficiaries should comply with the terms of the will, it seems clear that it was the intention of the testator, in case appellant did build the home, to create an active trust; the trustees to manage the *corpus* of the trust fund and pay over annually to appellant the proceeds thereof, so long as it maintained the home.

4, 5. Under the second assignment of error, it is urged that appellant is entitled to the income of the estate of testator which accrued between the date of his death and the date of the establishment of the Royal D. Hartung Home, upon the general rule that:

"A residuary bequest, contingent in terms, carries the intermediate income, which is not disposed of but accumulates." (40 Cyc. 1569.)

Conceding the correctness of the rule, we do not think appellant can be said to be a residuary legatee. There is but one "residue" of an estate. It is that which is left after the payment of debts, legacies (specific and general), and satisfying other specific gifts. (*Frelinghuysen v. Insurance Co.*, 31 R. I. 150, 77 Atl. 98, Ann. Cas. 1912B, 237; *Stevens v. Underhill*, 67 N. H. 68, 36 Atl. 370; New Standard Dictionary; Webster's Inter. Dict.)

If we understand correctly the meaning of the term "residuary bequest," it is that the residue of an estate is bequeathed to a person, absolutely. As we have seen, such is not the fact in this instance. The residue of testator's estate does not go to applicant at all, but to

trustees, who are to pay over to appellant annually the income from the residue of the estate.

6. Appellant complains of the delay of the executors in closing up the estate. The executors made two reports before the final report was made. Both of these were "approved, allowed, and settled" by the court. There is no evidence in the record that the estate could have been settled sooner with advantage to the estate, and this court will not presume such to have been the fact. (*In Re Moore's Estate*, 83 Cal. 583, 23 Pac. 794.)

Perceiving no error in the record, it is ordered that the order and decree appealed from be affirmed.

By the Court, COLEMAN, J. (on motion to retax costs and for attorneys' fees) :

Since the filing of the opinion in this case, counsel for appellant have applied to the court for an order to retax the costs on appeal, and for an order awarding them attorneys' fees.

As to the first motion, we need simply say that the court is without jurisdiction to consider it. Paragraph 3 of rule VI of this court provides :

"If either party desires to object to the costs claimed by the opposite party, he shall, within ten days after the service upon him of a copy of the cost bill, file with the clerk and serve his objections. Said objections shall be heard and settled and the costs taxed by the clerk. An appeal may be taken from the decision of the clerk, either by written notice of five days, or orally and instant, to the justices of the court, and the decision of such justices shall be final. If there be no objections to the costs claimed by the party entitled thereto, they shall be taxed as claimed in the cost bill."

From even a casual reading of this rule it will be seen that this court cannot consider objections to a cost bill except on appeal from a decision of the clerk of the court. The matter is not before us on appeal from such a decision.

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In the matter of the motion for the allowance of attorney's fees, it is asked that the court enter an order directing the Grand Lodge of the Independent Order of Odd Fellows to pay the expenses of the proceedings heretofore had, including the attorneys' fees, "out of the funds coming to said Grand Lodge" from the Hartung estate.

In the first place, we do not see how we can make an order on this appeal which in legal effect would be a judgment in favor of the attorneys and against the appellant. No issue has been made up and tried in the lower court involving the question, and no such question was before us on appeal. To grant the order sought would be equivalent, in legal effect, to rendering a judgment against appellant in a proceeding in which it has not had its day in court.

If counsel for appellant are entitled to any compensation for their services out of the estate of decedent, we think it is entirely a matter within the province of the court below.

It is the order of the court that both motions be denied.

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## Argument for Respondent

[No. 2216]

IN THE MATTER OF THE APPLICATION OF EDSON LA  
VERE FOR A WRIT OF HABEAS CORPUS

[156 Pac. 446]

## 1. HABEAS CORPUS—FUGITIVE FROM JUSTICE—JUDICIAL INQUIRY.

Where by *habeas corpus* a petitioner seeks release from an executive warrant issued upon the requisition for extradition of the governor of a demanding state, on the ground that he is not a fugitive from justice of the demanding state, the court will inquire into the existence of the facts determinative of that issue.

## 2. EXTRADITION—FUGITIVE FROM JUSTICE—CONFLICTING EVIDENCE—JURISDICTION.

The guilt or innocence of one held under extradition as a fugitive from the justice of another state is a matter exclusively for the courts of the demanding state where the evidence is conflicting.

## 3. HABEAS CORPUS—FUGITIVE FROM JUSTICE—INNOCENCE—CONCLUSIVE SHOWING—DISCHARGE.

Where in *habeas corpus* proceedings brought by one held for extradition as a fugitive from the justice of another state the evidence, including that of the complaining witness, shows conclusively that the crime charged could not have been committed, and hence that petitioner could not have been a fugitive from justice, the petitioner will be discharged.

**ORIGINAL PROCEEDING.** Application for writ of *habeas corpus* by Edson La Vere, held in custody for extradition. **Petitioner discharged.**

*Ayres & Gardiner*, for Petitioner:

If petitioner supported his wife and child until the day he left the State of New Jersey, he cannot be guilty of the offense upon which the requisition for his extradition is based, and is not therefore a fugitive from justice. (*In Re Kuhns*, 36 Nev. 487.)

*Geo. B. Thatcher*, Attorney-General, and *E. T. Patrick*, Deputy Attorney-General, for Respondent:

Petitioner should be remanded to the custody of the sheriff for extradition to the demanding state. The facts in *In Re Kuhns* do not apply. In that case there was a contract between the husband and wife to live separate



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Opinion of the Court—NORCROSS, C. J.

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and apart. In the present instance petitioner left his wife against her desire and without her consent.

By the Court, NORCROSS, C. J.:

This is an original proceeding in *habeas corpus*. The return to the writ showed that petitioner was held in custody upon an executive warrant issued by the governor of this state upon requisition of the governor of the State of New Jersey. It appears from the requisition papers that petitioner was charged with the crime of wife and child desertion, committed in the county of Essex, State of New Jersey, on the 17th day of July, 1915.

Upon appearance in court upon the return to the writ it was stipulated by counsel for the respective parties that the hearing be continued for the purpose of taking certain depositions in New Jersey bearing upon the question at issue, whether or no petitioner was a fugitive from justice. Hearing was thereupon continued, and the petitioner was released on bail pending the final determination.

Depositions having been taken and filed, the matter was heard upon the depositions and the testimony of the petitioner. From the deposition of the complaining witness, wife of petitioner, and from all of the testimony in the case, certain material facts appear without conflict in the testimony. It appears from the evidence that from the date of the separation of petitioner and his wife, in December, 1914, to a time subsequent to the alleged desertion, petitioner contributed to the support of his wife and child by weekly payments of money, the sufficiency of which payments has not been questioned. It appears from the testimony of the complaining witness that at the time of the alleged desertion she had in her name in a bank at Newark the sum of \$120, money given to her by petitioner prior to their separation.

1-3. Where upon a proceeding in *habeas corpus* a petitioner seeks release from an executive warrant issued upon the requisition of the governor of a demanding state,

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Points decided

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on the ground that he is not a fugitive from the justice of that state, a court will inquire into the existence of facts determinative of that issue. The determination of the guilt or innocence of the petitioner from conflicting evidence is a matter exclusively within the province of the courts of the demanding state. Where, however, as in this case, all the testimony, including that of the complaining witness, shows conclusively that the crime charged could not have been committed, and hence petitioner could not have been a fugitive from justice, the petitioner ought to be discharged. (*In Re Kuhns*, 36 Nev. 487, 137 Pac. 83, 50 L. R. A. n. s. 507; *Ex Parte Smith*, 35 Nev. 80, 126 Pac. 655, 129 Pac. 308.)

Petitioner discharged.

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[No. 2222]

**JAMES REGAN, RELATOR, v. W. T. KING, JUSTICE OF THE PEACE IN AND FOR CARSON TOWNSHIP, ORMSBY COUNTY, STATE OF NEVADA, RESPONDENT.**

[156 Pac. 688]

**1. JUSTICES OF THE PEACE—STATUTORY PROVISIONS—CONSTRUCTION—ANSWER.**

Since the civil practice act, section 294 (Rev. Laws, 5236), providing for entry of judgment for the plaintiff where defendant fails to answer, and that an answer shall include any pleading that raises an issue of law or fact, whether by general or special appearance, is not made applicable to justices' courts by reason of civil practice act, sec. 873 (Rev. Laws, 5815), providing that only the provisions of the act which are in their nature, or which have been made, applicable, are applicable to justices' courts and the proceedings therein, because civil practice act, sec. 812 (Rev. Laws, 5754), sets forth a separate and complete system governing trials and judgments in the justice court, similar to the system prescribed by section 294; and when a separate and independent section is found in the practice act covering the matter of pleading in the justice court, it must be construed that the legislative intent was to limit the provisions of section 294 to the district court; the relator's special appearance challenging the jurisdiction of the justice court was not affected by the provisions of section 294 and was not an answer.

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Argument for Respondent

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## 2. JUSTICES OF THE PEACE—JURISDICTION—STATUTE.

Under civil practice act, section 812, governing trials and judgments in the justice court, and providing that where the defendant fails to answer within the time specified in the summons, the court may render judgment in favor of the plaintiff, where the plaintiff appeared specially and filed a motion to dismiss the complaint, but did not answer, the justice did not exceed his jurisdiction in entering a default against a defendant and denying him time to answer after the time prescribed by law had expired.

## 3. LANDLORD AND TENANT—UNLAWFUL DETAINER—TREBLE DAMAGES.

Rev. Laws, 5599, concerning unlawful detainer and providing that "judgment shall be rendered against the defendant \* \* \* for the rent and for three times the amount of damages assessed," does not clearly authorize the trebling of the amount of rent found due, as the statute mentions other elements of damage, such as waste, and while the legislature has used language to indicate that in some way treble damages are to be recovered from tenants holding over, the statute having failed to show what damages should be trebled, as penalties and forfeitures will not be extended by implication and doubtful construction, no such judgment can be rendered against a tenant holding over.

ORIGINAL PROCEEDING in *certiorari*, on the relation of James Regan, against W. T. King, Justice of the Peace in and for Carson Township. **Order denied.**

*William W. Griffin*, for Relator:

An answer is such whether filed in the district or the justice court; and unless there be something absolutely inconsistent with its application to the practice and proceedings in the latter court, it must necessarily apply there.

A writ of *certiorari* lies to correct any legal mistake. (2 R. C. L. 327-337.) The function of the writ is simply to ascertain the validity of proceedings before a justice of the peace, either on the charge of their invalidity because the essential forms of the law have not been observed, or for want of jurisdiction in the court. (5 R. C. L. 251.)

Relator is entitled to have his day in court, to demur or answer, as he may deem proper. (Rev. Laws, 5236, 5274, 5815.)

*John M. Chartz*, for Respondent:

The writ of *certiorari* should not be granted, unless it

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be found that the lower court did not have jurisdiction of the case. Relator, having filed a special appearance, withheld himself from the jurisdiction of the court, and was bound to stand upon the order denying his motion, and could have appealed from said order to the district court. (*Kapp v. District Court*, 31 Nev. 444.)

A judgment by default is not reviewable upon *certiorari*. (*Skerer v. Superior Court*, 96 Cal. 653; *Hetzel v. Commissioners*, 8 Nev. 359.)

Relator was in default in the justice court. (*Higley v. Pollock*, 21 Nev. 198; *Mantle v. Vasey*, 78 Pac. 591; *Murphy v. Minot F. & M. Co.*, 139 N. W. 518.)

Section 5236, Revised Laws, does not apply, the same having reference to pleadings in the district court. Section 5815, Revised Laws, governs proceedings in the justice court. The powers of the justice court are determined by the provisions of the code expressly applicable to them, and not by provisions expressly applicable to courts of record. (*Weimer v. Sutherland*, 74 Cal. 341.)

By the Court, MCCARRAN, J.:

This is an original proceeding in *certiorari*. Upon the petition of relator, an order was issued, directing the respondent to show cause why a writ of *certiorari* should not issue. By stipulation, the entire matter may be considered as though the writ had issued in the first instance.

An action was commenced in the justice court of Carson township by Ford, McLaughlin, and Kitzmeyer against the relator, James Regan. The complaint was filed in that court on the 16th day of February, 1916; and on the 18th of the same month petitioner here, who was defendant in the action, appeared specially and filed a motion to dismiss the complaint, upon the ground that the court had no jurisdiction of the subject-matter of the action.

On the 19th of February, an order was made in the justice court setting the hearing on said motion for the 23d day of February at 10:30 a. m.

On the 24th day of February, the matter being considered by the court, an order was issued denying Regan's

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Opinion of the Court—McCarran, J.

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motion to dismiss. On the same day, to wit, the 24th day of February, attorney for plaintiffs Ford, McLaughlin, and Kitzmeyer asked that judgment be entered against the defendant, Regan, on the ground that he had failed to appear within the time limit of five days contained in the summons, as prescribed by law. Attorney for defendant, relator herein, being present in court, asked time in which to answer. The matter being submitted, the court on the 24th day of February rendered judgment denying the defendant time to answer, on the ground that the time as prescribed by law had expired, and at the same time granted plaintiff's motion for a judgment.

On the 29th day of February, the court heard evidence in behalf of the plaintiff and entered judgment in their behalf for the sum of \$210, the same being triple damages, for \$25 attorney's fees, and costs of court, and for a writ of restitution covering certain property described in the complaint.

1,2. It is the contention of petitioner here that the respondent, as justice of the peace, exceeded his jurisdiction when, on the 28th day of February, he refused to allow petitioner to answer the complaint and make defense to the merits. He asserts that the special appearance made for the purpose of testing the jurisdiction of the court constituted an answer, and in this respect respondent refers to the several provisions of our civil practice act. Section 294 of that act (Rev. Laws, 5236) is as follows:

"Judgment may be had, if the defendant fail to answer the complaint, as follows:

"1. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon the application of the plaintiff, shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons. \* \* \*

"2. In other actions, if no answer has been filed with the clerk of the court within the time specified in the

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summons, or such further time as may have been granted, the clerk shall enter the default of the defendant; and thereafter the plaintiff may apply at the first, or any subsequent term of the court, for the relief demanded in the complaint. \* \* \*

"3. \* \* \* The word 'answer' used in this section shall be construed to include any pleading that raises an issue of law or fact, whether the same be by general or special appearance."

Section 812 of the civil practice act (Rev. Laws, 5754) is as follows:

"If the defendant fails to appear, and to answer or demur within the time specified in the summons, then, upon proof of service of summons, the following proceedings must be had:

"1. If the action is based upon a contract, and is for the recovery of money, or damages only, the court must render judgment in favor of the plaintiff for the sum specified in the summons.

"2. In all other actions the court must hear the evidence offered by the plaintiff and must render judgment in his favor for such sum (not exceeding the amount stated in the summons) as appears by such evidence to be just."

Section 873 of the civil practice act (Rev. Laws, 5815) provides:

"Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this act which are, in their nature, applicable to the organization, powers, and course of proceedings in justices' courts or which have been made applicable by special provisions in this title, are applicable to justices' courts and the proceedings therein."

It is by reason of this latter section that relator contends that the provisions of the third paragraph of section 294 is applicable to the justice court, and hence that his special appearance was an answer within the contemplation of that section.

Section 294 of the civil practice act undoubtedly affects proceedings in the district court. (*Esden v. May*, 36 Nev.

611, 135 Pac. 1185.) But that it does not pertain to the justice court is made manifest from the fact that section 812 of the practice act sets forth a separate and complete system governing trials and judgments in the justice court; a system prescribed to meet the same contingencies that are contemplated by section 294. While it is true that the provisions of section 294, wherein the word "answer" is declared to include any pleading that raises an issue of law or fact, might and in fact would be applicable to justice court practice, yet when a separate and independent section is found in the practice act covering the matter of pleading in the justice court, it must be construed that the legislative intent was to limit the provisions of section 294 to the district court.

Viewing the statute thus, we must conclude that relator's special appearance, challenging the jurisdiction of the court, was not affected by the provisions of section 294, and hence was not an answer.

The act of the justice of the peace in entering the default of the defendant was not in excess of his jurisdiction. We may add, however, that it is customary, and, we think, highly proper, that in such cases reasonable time is granted within which for the party to answer to the merits. Unless a litigant is wilfully trifling with the time of the court, and no such attitude appears in this case, the very justice of the situation demands that he be permitted to appear and defend on the merits, if he has such defense. In the matter as it is before us in this proceeding, the question is: Did the justice of the peace exceed his jurisdiction? The wording of the statute makes it possible for the justice to do as was done here, and he cannot be successfully accused of exceeding his jurisdiction for so doing. By this means, however, an avenue is open for gross miscarriage of justice, in that a litigant may be cut off from an opportunity to interpose a legitimate defense—may be deprived of his day in court.

3. The action against the respondent was commenced under section 5699, Revised Laws, which provides:

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"If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and, if the proceeding be for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement. The jury, or the court if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, and any amount found due the plaintiff by reason of waste of the premises by the defendant during the tenancy, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent; and the judgment shall be rendered against the defendant guilty of forcible entry, or forcible or unlawful detainer, for the rent and for three times the amount of the damages thus assessed. When the proceeding is for an unlawful detainer after default in the payment of the rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied, and the tenant be restored to his estate; but if payment, as herein provided, be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately."

The complaint in the action prayed:

"For restitution of the premises and for damages for the rents and profits thereof; that such damages may be



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trebled as damages for the occupation and unlawful detention and holding over of the same, amounting to \$210; and for \$25 attorney's fees; and for costs of this action."

Pursuant to this prayer, it appears, judgment was entered accordingly. The language appearing in section 5599, Rev. Laws, *supra*, reading, "And the judgment shall be rendered against the defendant \* \* \* for the rent and for three times the amount of the damages thus assessed," does not, we think, clearly authorize the trebling of the amount of rent found due, for the statute mentions other elements of damage, such as "waste," etc.

While the language of the statute under consideration is not precisely the same as that in the statute considered in the case of *Hoopes v. Meyer*, 1 Nev. 446, we think the following quotation from the opinion in that case is applicable so far as trebled damages for rent due, under the provisions of the section:

"Whilst, then, we think the legislature has used language which would seem to indicate that in some way treble damages were to be recovered from tenants holding over, the statute has utterly failed to show what damages should be trebled. Under, then, the well-known principle that penalties and forfeitures will not be extended by implication and doubtful construction, we feel justified in holding that this section does not authorize treble damages in any specific class of cases, and no such judgment can be rendered against a tenant holding over."

This matter, while not strictly before us in these proceedings, is so apparent from the record that we deem it of sufficient importance to make mention thereof, that the justice may by his own motion, or otherwise, correct the judgment or set aside the same.

The order as prayed for is denied. It is so ordered.

NORCROSS, C. J.: I concur.

COLEMAN, J.: I concur in the order.

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## Argument for Appellant

[No. 2205]

ANNA BROWN KILLGROVE, GUARDIAN OF THE  
PERSON AND ESTATE OF DENEZE BROWN (A MINOR),  
APPELLANT, v. CHARLES MORRISS AND FLORA  
MORRISS (HIS WIFE), RESPONDENTS.

[156 Pac. 686]

1. JUSTICES OF THE PEACE—CIVIL JURISDICTION—CHARACTER OF  
PARTIES—GUARDIANS.

Under Const. art. 6, secs. 6-8, providing that district courts shall have jurisdiction in all cases where the demand exceeds \$300 and all cases relating to the persons and estates of minors and insane persons, and giving the legislature power to fix the powers of justices of the peace, provided they shall not have jurisdiction conflicting with that of courts of record, and Rev. Laws, 5714, 5726, conferring jurisdiction upon justices' courts in actions on contract for the recovery of money only where the demand is not over \$300, and providing for appearance by general guardian or guardian *ad litem* of an infant or insane person in justice's court, a justice's court has jurisdiction in actions at law brought by the guardian of a minor where the amount involved does not exceed \$300.

APPEAL from the Eighth Judicial District Court, Churchill County; *T. E. Hart*, Judge.

Action by Anna Brown Killgrove, guardian, against Charles Morriss and wife. From a judgment for defendants upon demurrer to the complaint, plaintiff appeals. **Affirmed.**

*Mack & Green*, for Appellant:

The demurrer to the complaint should have been overruled. The district court had jurisdiction to hear and determine the matters set forth in the complaint. (Const. Nev. sec. 6, art. 6; *Deegan v. Deegan*, 22 Nev. 197.)

In cases where the constitution gives the district court original jurisdiction, as in this case, it has been held that it was an exclusive jurisdiction. (*Peacock v. Leonard*, 8 Nev. 87.)

The lower court erred in dismissing the action without giving appellant an opportunity to amend her complaint. (Rev. Laws, 5043; *Cal. State T. Co. v. Patterson*, 1 Nev. 150; *Lake Bigler Road Co. v. Bedford*, 3 Nev. 399; *Treadway v. Wilder*, 8 Nev. 91.)

*Percy & Smith*, for Respondents:

Section 8, article 6, Constitution of Nevada, gives the justice courts jurisdiction in cases in which the matter in dispute is a money demand, or personal property, and the amount in demand (exclusive of interest), or the value of the property, does not exceed \$300, not excepting therefrom the cases in which a minor is a party.

The constitution does not restrict the jurisdiction of justice courts over any class of persons; and to hold that the phrase, "persons and estates of minors," as used in section 6, article 6, imposes the duty of trying all cases in which a minor is a party upon the district court, would create a conflict between the jurisdiction of the district courts and the justice courts, and would make section 8, article 6, repugnant to section 6, and would give that phrase a meaning not contemplated or intended by the framers of the constitution. In construing constitutional provisions it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision; and if there is any apparent repugnancy between the different provisions, the court should harmonize them if possible. (6 R. C. L., sec. 41, p. 47.)

As the complaint could not be amended to bring the matter within the jurisdiction of the district court, the court did not err in dismissing the case.

By the Court, NORCROSS, C. J.:

This is an appeal from the judgment on the judgment roll alone. To plaintiff's complaint in an action at law brought in the district court to recover a money judgment in the sum of \$113.40, a demurrer to the jurisdiction of the court was interposed and sustained.

The question is presented whether the district court or the justice's court has jurisdiction in actions at law brought by the guardian of a minor where the amount involved does not exceed \$300.

Article 6, section 6, provides:

"The district courts \* \* \* shall have original jurisdiction in all cases in equity; also \* \* \* in all other

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cases in which the demand exclusive of interest \* \* \* exceeds three hundred dollars, also in all cases relating to the estates of deceased persons, and the persons and estates of minors and insane persons. \* \* \* " (Rev. Laws, 321.)

Section 8 of the same article provides:

"The legislature shall determine the number of justices of the peace \* \* \* and shall fix by law, their powers, duties and responsibilities, provided, that such justices' courts shall not have jurisdiction of the following cases, viz: \* \* \* Of cases that in any manner shall conflict with the jurisdiction of the several courts of record. \* \* \* " (Rev. Laws, 323.)

By statute, jurisdiction is conferred upon justices' courts "in actions arising on contract for the recovery of money only if the sum claimed, exclusive of interest, does not exceed three hundred dollars." (Rev. Laws, 5714.)

It is the contention of counsel for appellant that the language of the constitution, *supra*, fixing original jurisdiction in the district courts "in all cases relating to \* \* \* the persons and estates of minors," brings this case exclusively within the jurisdiction of the district court because the action is brought by the guardian of the minor and involves rights growing out of his estate.

There are positive provisions in the sections of the constitution and statute cited, *supra*, which would fix the jurisdiction to try this case in the justice's court. However, if the construction contended for by counsel for appellant is given to the words in section 6, "in all cases relating to \* \* \* the persons and estates of minors," then this case was properly brought in the district court.

The following well-established rule of constitutional construction is quoted from 6 Ruling Case Law, p. 41, sec. 41:

"In construing a constitutional provision it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision, and if there is an apparent repugnancy between different provisions the court should

harmonize them if possible. Frequently the meaning of one provision of a constitution standing by itself may be obscure or uncertain, but is readily apparent when resort is had to other portions of the same instrument. It is therefore an established canon of constitutional construction that no one provision of the constitution is to be separated from all the others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. \* \* \* ”.

We quote the following from the brief of counsel for appellant:

“In the original draft of this section of the constitution, no provision whatever was made (in so many words) ‘for taking care of the persons and estate of minors nor insane persons.’ In the debate found on page 653 of the Nevada Constitutional Debates and Proceedings will be found the following language:

“ ‘Mr. Johnson—I move to amend by inserting after the words “Deceased persons,” the words, “and the persons and estates of minors.”

“ ‘Mr. Banks—I would suggest, further, whether it would not be well to include cases of divorce.

“ ‘Mr. De Long—They are covered already. These are actions in equity, and it is provided that the district courts shall have original jurisdiction in all cases in equity. They will also have jurisdiction in all other cases provided for by law.

“ ‘Mr. Brosnan—I have no objection to the amendment of the gentleman from Ormsby (Mr. Johnson), but it appears to me that the courts *must have equity jurisdiction over the estates of minors and insane persons. That is clearly a branch of the equity jurisdiction of the courts.*

“ ‘Mr. Johnson—I will add to my amendment, the words, “and insane persons.”

“ ‘The question was taken on the amendment offered by Mr. Johnson, as modified, and it was agreed to.’

“Hence it will be seen that the framers of the constitution knew and stated that all matters concerning the

persons and estates of minors and insane persons had to be dealt with, in a court of equity, and that a court of equity alone had jurisdiction. The constitution having already provided that the district courts should have original jurisdiction in all cases in equity and to place the matter beyond question, adopted the amendment giving the district courts original jurisdiction in all cases relating to the estates of deceased persons and the persons and estates of minors and insane persons."

It is not clear to us from a reading of the brief debate upon the question that counsel's interpretation of the views expressed is a correct one. Rather it would seem to us that the expressions, particularly of Mr. De Long and Judge Brosnan, were to the effect that the provision of the proposed section, giving district courts general equity jurisdiction, was sufficient to cover cases relating to the persons and estates of minors without more, but that there could be no objection to making the provision more specific. We do not think it can be said, from anything which appears in this debate, that the purpose of the Johnson amendment was to invest district courts with a more extensive jurisdiction in these matters than was usually cognizable by courts of equity. Actions at law by executors, administrators, or guardians in their representative capacity have never been considered as essentially partaking of the equitable character of proceedings in the estate itself. Even an action in equity to foreclose a mortgage against the property of a decedent is regarded as a case outside the matter of the estate itself. (*Corbett v. Rice*, 2 Nev. 330; *Kirman v. Powning*, 25 Nev. 378, 60 Pac. 834; 61 Pac. 1090.)

There is some rather convincing evidence that Judge Johnson, who proposed the change in the original draft of the section of the constitution in question, did not have in mind that the added words would warrant the construction counsel for appellant seeks to have placed upon them. The legislature of 1866 passed an act appointing Judge Johnson "a commissioner to prepare and report to the legislature \* \* \* a civil practice act, complete in all its parts so far as practicable." (Stats. 1866, p. 158.)

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The civil practice act adopted by the legislature of 1869 (Stats. 1869, p. 196), which doubtless was the work of Judge Johnson, provides in several sections for suits to be prosecuted and defended in justice's courts by executors and administrators of the estates of deceased persons and by guardians of infants. (See sections 6, 9, 10, 509, 515.) Section 515 expressly authorized justices of the peace to appoint guardians *ad litem* for infant plaintiffs or defendants. These provisions of the civil practice act of 1869 continued without change until the adoption of the code of 1912. Section 784 (Rev. Laws, 5726), relating to actions in justice's courts, in part reads:

"When an infant, insane, or incompetent person is a party, he must appear, either by his general guardian if he have one, or by a guardian *ad litem* appointed by the justice."

It will thus be seen that throughout practically the entire history of the state the right of executors, administrators, and guardians to sue and be sued in justice's courts, in cases otherwise cognizable by that court, has been recognized by statute. This fact is entitled to great weight in interpreting a provision of the constitution. (6 R. C. L., secs. 59, 60.)

While the language used in the constitution of this state is not precisely the same as that appearing in the constitution of California and some other states which have considered a similar question, the construction placed by the legislature upon the provisions of our constitution by its statutory enactments is the same as that placed by the courts of other states upon similar constitutional and statutory provisions. (*Gallagher v. McGraw*, 132 Cal. 601, 64 Pac. 1080; *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596; *Idaho Trust Co. v. Miller*, 16 Idaho, 308, 102 Pac. 360; *Bradwell v. Wilson*, 158 Ill. 346, 42 N. E. 145; *Peterson v. Baillif*, 52 Minn. 386, 54 N. W. 185.)

The judgment is affirmed.

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## Argument for Appellant

[No. 2189]

A. A. HIBBARD, RESPONDENT, v. E. G. CLARK, AS  
ADMINISTRATOR OF THE ESTATE OF A. J. CLARK,  
DECEASED, APPELLANT.

[156 Pac. 447]

1. EXECUTORS AND ADMINISTRATORS—REJECTED CLAIM—COMPLAINT  
—PARTICULARITY.

Where plaintiff's rejected claim against decedent's estate admitted a set-off in favor of decedent for several loans made on the security of real estate and contracts to purchase real estate, the complaint in an action on such rejected claim was insufficient for uncertainty where it failed to specifically set out the loans made, and the property transferred and contracts assigned as security with sufficient fullness to acquaint the defendant administrator and the court therewith.

## 2. EXECUTORS AND ADMINISTRATORS—CLAIMS—OFFSETS—STATUTE.

Rev. Laws, 5965, providing for the support by affidavits of claims against decedents' estates, contemplates that offsets in favor of the decedent and known to the claimant be credited upon the claim.

## 3. EXECUTORS AND ADMINISTRATORS—COMPLAINT—SET-OFF—INCLUSION.

In a complaint on a rejected claim against a decedent's estate, the facts constituting an offset or counterclaim in favor of the estate must be alleged; the general rule of pleading that a complaint need not allege facts constituting an offset or counterclaim being inapplicable by reason of the provisions of Rev. Laws, 5965, which contemplates the credit of offsets upon such claims.

APPEAL from Second Judicial District Court, Washoe County; *Thomas F. Moran*, Judge.

Action by A. A. Hibbard against E. G. Clark, administrator, to establish a rejected claim against the estate of A. J. Clark, deceased. From an order overruling his demurrer to the complaint and judgment by default for failure to answer over, defendant appeals. Judgment and order overruling demurrer **reversed**.

*James T. Boyd*, for Appellant:

In claims against estates the statements must be clear and unambiguous, so that the claims may be distinguished with reasonable certainty from all other similar claims. (18 Cyc. 480; *Litchenberg v. McFlynn*, 105 Cal. 45; *Etchas v. Orena*, 127 Cal. 588.)



Section 5965, Revised Laws, requires that due credit be given in claims filed against estates of deceased persons, and that all offsets be set forth clearly and distinctly.

Appellant stood upon his demurrer, overruled by the court, and appeals from the judgment. No bill of exceptions is necessary, as this court will deal with the errors appearing on the face of the judgment roll. The law deems the decision of the court in overruling a demurrer to be excepted to. (Stats. 1915, p. 166, sec. 11; Rev. Laws, 5318; *Daly v. Lahontan M. Co.*, 39 Nev. 14.)

*Dixon & Miller*, for Respondent:

The transcript on appeal should be stricken from the files and the appeal dismissed, statements on appeal having been abolished. (Stats. 1915, c. 142.)

In the absence of a bill of exceptions and an assignment of errors, the demurrer cannot be considered by the court. (*McCausland v. Lamb*, 7 Nev. 238; *Reinhart v. Company D*, 23 Nev. 369; *Peers v. Reed*, 23 Nev. 404; *State v. Wallin*, 6 Nev. 280.)

The claim of respondent was in such form that, if demurred to, it would be held to state a good cause of action. (*Kirman v. Powning*, 25 Nev. 378.)

A consideration of the transcript will make it clear that the appeal was taken merely for delay, and under the statute and practice respondent is entitled to damages for the delay. (*Paroni v. Simonson*, 34 Nev. 26.)

By the Court, COLEMAN, J.:

This is an appeal from the judgment on the judgment roll alone. The judgment was by default for failure to answer after demurrer was overruled, and was for the full amount prayed for, to wit, \$1,995. But one question is presented—whether the court below erred in overruling defendant's demurrer to plaintiff's second amended complaint.

The complaint in question alleged that A. J. Clark, deceased, in his lifetime became and was indebted to the plaintiff in the sum of \$2,000 for work, labor, and services as agent and business manager for the said deceased

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at his special instance and request, within four years immediately preceding the death of said decedent; that nothing had been paid on account of said services except the sum of \$5. The complaint then further alleged:

"That said deceased, during his lifetime, made to said plaintiff several loans secured by conveyances of real estate and by assignments of contracts for sale of real estate, upon which loans divers payments have been made by the plaintiff from time to time, and the balance now due on said loans amounts to the sum of \$881.51 or thereabouts; that the plaintiff is willing to allow the said sum of \$881.51 to be applied on account of the above amount so due by the estate of the said deceased to the plaintiff."

The prayer of the complaint is as follows:

"Wherefore the plaintiff demands judgment against the defendant for the sum of \$1,995, together with his costs of suit and other appropriate relief, with the privilege to the defendant to set off or counterclaim said sum of \$881.51 on reconveying to the plaintiff all real estate conveyed to said deceased as security for said loans and reassignments of all contracts for sale of real estate heretofore assigned by the plaintiff to the said deceased as security for said loans."

Attached to the complaint as an exhibit, and made a part thereof, is a copy of the claim filed with the administrator, the rejection of which is the basis of the action. The body of the claim filed is substantially as set forth in the complaint as quoted and referred to *supra*. The affidavit attached to the claim reads:

"A. A. Hibbard, being first duly sworn, deposes and says: That he is the claimant whose foregoing claim is herewith presented to the administrator of the estate of said deceased; that the amount hereof, to wit, the sum of \$1,113.50, is justly due to said claimant after deducting the said sum of \$881.50, the balance due on said loans as above set out; that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of affiant, save and except as aforesaid.

A. A. Hibbard."

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The first and second grounds of demurrer are as follows:

"I. That the said second amended complaint is ambiguous, in this: That it cannot be ascertained from said complaint what conveyances or what real estate said plaintiff conveyed to A. J. Clark, or what kind or character of assignments of contract for the sale of real estate were delivered by plaintiff to A. J. Clark; nor can it be ascertained from said complaint for what real estate said contract of sale was given, nor the amounts due upon such contracts of sale; nor can it be ascertained from said complaint what land was to be conveyed by said contracts of sale, or by the conveyances mentioned in said complaint."

"II. That the said second amended complaint is uncertain for the same reasons that it is ambiguous."

1-3. The statute contemplates that offsets, known to the claimant and in favor of the decedent, be credited upon the claim. (Rev. Laws, 5965.) While much liberality may be indulged in in sustaining a claim as not being so defective in form as to render it void for ambiguity or uncertainty, where suit is instituted upon such a claim upon rejection, the allegations of the complaint ought to be sufficient to clarify an ambiguous or uncertain statement contained in the claim as filed.

The decision of the court below was based upon the general rule that in an action against an individual defendant a plaintiff is not required to allege facts constituting an offset or counterclaim. While we have not been cited to a case directly in point, we think it better to hold that the general rule is inapplicable by reason of the provisions of the statute.

The claimant here admits in his claim filed that a certain amount of money was owing by him to the estate on account of certain loans to him made by the decedent which were secured by certain transfers of real estate and assignments of certain contracts affecting real estate. There is as much reason for an assumption that the administrator would not know, as there is that he would know,

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the nature of these loans, transfers, and assignments. It is entirely possible that he might know little or nothing in respect to the same. The claimant is in possession of the facts, and he ought to allege the same with sufficient fullness to acquaint the defendant administrator and the court with the amount of the loan or loans, payments made thereon, and what specific property was transferred and what contracts were assigned as security. The administrator would not otherwise be advised as to what property was involved or the court be able to enter a judgment in respect thereto. The demurrer to the complaint should have been sustained.

A motion to strike the transcript and to dismiss the appeal has been interposed. We have considered the same in connection with a stipulation of counsel attached to the transcript. The stipulation constitutes a waiver of the objections imposed, and hence the motion is denied.

The judgment and the order overruling the demurrer are reversed, and the cause remanded, with directions to enter an order sustaining the demurrer and giving the plaintiff further time to file an amended complaint.

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## Argument for Appellants

[No. 2166]

**FIRST NATIONAL BANK OF ELY (A CORPORATION),  
RESPONDENT, v. W. E. MEYERS AND DORA  
MEYERS, APPELLANTS.**

[150 Pac. 308]

**1. HUSBAND AND WIFE—COMMUNITY ESTATE—RIGHT TO CONTROL.**

As a general proposition, by reason of the husband's sole right to control the community property, he may alienate during the coverture, without the consent of the wife, any property belonging to the community.

**2. HOMESTEAD—INTEREST OF WIFE—PROTECTION.**

Const. art. 4, sec. 30, declares that a homestead shall be exempt from forced sale and shall not be alienated without the joint consent of the husband and wife. Stats. 1865, c. 72, sec. 1, passed pursuant to the constitution, provides that a homestead selected by the husband and wife shall be exempt from forced sale, and that the selection shall be made by the recordation of a declaration of intent. Const. art. 4, sec. 31, declares that all property of the wife owned before marriage shall be her separate property. The act of 1873, passed pursuant to the constitution provides in section 1 (Rev. Laws, 2155) that all property of the wife owned before marriage and acquired thereafter by gift, bequest, devise, or descent is her separate property, and that property similarly acquired by the husband should be his separate property, while section 2 (section 2156) declares that all other property acquired during the marriage shall be the community property. Section 6, as amended in 1897 (section 2160), declares that the husband has entire control over the community property, with absolute power of disposition, but that no deed of conveyance or mortgage of a homestead, regardless of whether a declaration has been filed or not, shall be valid for any purpose, unless both the husband and wife execute and acknowledge it. *Held*, that though the homestead was not registered as required by law, the husband's sole conveyance or incumbrance of it cannot pass title.

**APPEAL** from Ninth Judicial District Court, White Pine County; *Ben W. Coleman*, Judge.

Action by the First National Bank of Ely against W. E. Meyers and Dora Meyers to recover possession of certain real property. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. **Reversed and remanded.**

*Anthony Jurich and Walker & Haight*, for Appellants:

The property in controversy is such a homestead as

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provided by law, and inalienable without the consent of the wife. (Const. Nev., art. 4, secs. 30, 31; Rev. Laws, 2160.)

*Chandler & Quayle*, for Respondent:

That part of the act of February 27, 1897 (Rev. Laws, 2160), amending the act of March 10, 1873, declaring that "no deed or conveyance, or mortgage of a homestead as now defined by law regardless of a declaration thereof has been filed or not, shall be valid for any purpose whatever unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate," is void, being repugnant to the provisions of section 30, article 4, Constitution of Nevada. (*Child v. Singleton*, 15 Nev. 461, 463; Nev. Const. Debates and Proc. 1864, pp. 285, 286, 287, 303; *Estate of David Walley*, 11 Nev. 260, 265; *Smith v. Shrieves*, 13 Nev. 303, 327; *Smith v. Stewart*, 13 Nev. 65, 69; *Commercial & S. Bank v. Corbett*, 5 Sawy. 543, 6 Fed. Cas. 217; *Roberts v. Greer*, 22 Nev. 318, 329.)

By the Court, MCCARRAN, J.:

From the record in this case, it is disclosed that W. E. Meyers and his wife, Dora Meyers, together with their family, resided for a number of years in certain property in the town of Ely, this property being their home and abode. Appellant Meyers, in or about the month of September, 1907, borrowed from respondent, the First National Bank of Ely, the sum of \$3,000, giving his note as security. At the same time he made, executed and delivered to A. B. Witcher, cashier of the respondent bank, a deed to the property then and theretofore occupied by himself and his wife, Dora Meyers, and their family as a home—their only home and habitation, so far as the record discloses. In the making of this instrument, appellant Meyers was not joined by his wife, nor does the record disclose that she was cognizant of his actions in this respect, or that she received, either directly or indirectly, any of the benefits of the money involved in the transaction; nor does it appear that any

of this money was used to purchase or build the home. On January 25, 1908, A. B. Witcher by deed conveyed the property to the respondent, the First National Bank of Ely; and on April 3, 1911, the appellant Meyers entered into an agreement with the respondent bank, in writing, part of which is as follows:

"Whereas, the party hereto of the second part did by deed dated September 7, 1907, convey to one A. B. Witcher the following described property, situated in the city of Ely, county of White Pine, State of Nevada [here follows a description of the property], and which deed was intended as security for the payment of a certain sum of money owing by the party hereto of the second part; and whereas, the party hereto of the first part has since succeeded to the interest of said Witcher in said indebtedness and the said security therefor and now holds title to said property as security for the repayment to it by said party of the second part of the sum of thirty-four hundred fifty-seven and  $\frac{1}{100}$  dollars, which sum is past due and now owing to said first party; and whereas, suit to foreclose the mortgage referred to would entail a large expense and so put an additional burden on said second party: Now, therefore, in consideration of the premises and of the mutual promises herein contained and to settle and define the business matters existing between the parties hereto in relation to said property, it is reciprocally agreed as follows:

"First—That from the date hereof the title, equitable as well as legal, to said property is recognized as vested and fixed in the party hereto of the first part, subject to the right of said second party to buy the same on complying with the terms and conditions hereof.

"Second—The exclusive right and option to buy the said property within six months from the date hereof is hereby granted unto said second party, conditional, however, upon his paying within said period of six months to said first party at its banking room in Ely, Nevada, the sum of thirty-four hundred fifty-seven and  $\frac{1}{100}$  dollars, with interest thereon at the rate of twelve per cent from the date hereof to the date of such payment,

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together with any sum or sums, with like interest, which may be paid out from time to time by the party hereto of the first part for taxes and insurance on or otherwise for the preservation, care and safe-keeping of said property.

"Third—All income and rents hereafter paid or which are payable by the tenants or occupants of the building or improvements on said property shall be paid to and belong to said first party, provided if said second party shall during said period of six months exercise his option to buy said property, then all rents collected by said first party shall be credited on the said purchase price computable under and provided in paragraph second above.

"Fourth—Time is of the essence of this option, and the terms and conditions hereof shall inure to the benefit of and bind the heirs, executors, administrators, successors and assigns of the parties hereto, as well and strongly as the parties themselves."

The foregoing instrument, like the deed to Witcher, was signed by appellant Meyers individually, without any act of acquiescence on the part of his wife, and, so far as the record discloses, without her knowledge or assent. This action being commenced in the court below by the respondent bank to recover possession of the property involved in the transaction between appellant Meyers and respondent, separate answers were filed by the appellant Meyers and his wife, Dora Meyers. The original answer filed by the appellant Dora Meyers contained allegations to the effect:

"(1) That prior to the 15th day of June, A. D. 1907, this defendant Dora Meyers, and defendant W. E. Meyers intermarried, and ever since have been and now are husband and wife; that there are four minor children, the issue of said marriage.

"(2) That prior to the 7th day of September, A. D. 1907, to wit, commencing with the 15th day of June, A. D. 1907, and continuously thereafter up to the present time, the said premises described in plaintiff's complaint were and have been owned and actually occupied by this defendant, together with her said husband and their four



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minor children, as a homestead, all of which the said plaintiff and its grantor, A. B. Witcher, then and there at all times well knew; that prior to the 7th day of September, A. D. 1907, to wit, continuously since June 15, A. D. 1907, said premises have been and now are actually occupied by this defendant and her said husband, together with their said minor children, as a homestead, and the same is claimed by this defendant as such and as exempt from forced sale; and this defendant has not, at any time, signed, executed, or delivered any instrument mortgaging, conveying, or in any other way or manner conveying, alienating, or incumbering said property or homestead to any person or persons whatsoever.

"(3) That the said premises and the building thereon, with the appurtenances, do not exceed in value the sum of \$5,000 in cash.

"(4) That neither this defendant nor her said husband, nor any of their said minor children, have any home other than on and in the premises described in said complaint.

"(5) That on or about the 4th day of November, A. D. 1914, this defendant, for the use and benefit and in behalf of herself and defendant W. E. Meyers and their said minor children, the issue of said marriage, all of which children are still minors, made, executed, and caused to be recorded in the office of the county recorder in and for White Pine County, Nevada, being the county and state in which said property is situated, and in Book 38, Old E., Miscellaneous Records of said office, at pages 429, 430, a declaration of homestead of, in, and to said described property, with the improvements thereon, which said declaration of homestead set forth the facts required by the statutes of the State of Nevada to be stated in a declaration of homestead, and which was duly acknowledged by this defendant as required by law, and that this defendant does now claim and hold, and at all times since the 15th day of June, A. D. 1907, has claimed and held, said property described in plaintiff's complaint, and the whole thereof, as a homestead for herself and her said husband and their said minor children."

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A demurrer to this original answer being sustained by the court below, the appellant Dora Meyers amended her answer, and in her amended answer set forth the following:

"(1) That for more than fifteen years last past, this defendant Dora Meyers, and defendant W. E. Meyers have been and now are husband and wife.

"(2) That prior to the 15th day of June, 1907, the said defendants, out of the moneys belonging to the community existing between said defendants, purchased the land described in plaintiff's complaint, and received a deed therefor in the name of the defendant W. E. Meyers, which said deed was recorded in the office of the county recorder of White Pine County, State of Nevada, on the 8th day of August, 1907, in Book 33, pages 402, 403, of the Real Estate Records of said county; that prior to the said 15th day of June, 1907, the said defendants, out of the moneys belonging to said community existing between said defendants, constructed and erected upon said premises a dwelling house, which said dwelling house and said premises, ever since the said 15th day of June, 1907, continuously have been and now are actually occupied by the said defendants, and each of them, and their minor children, as the dwelling house and home of said defendants and their minor children, and is the only dwelling house and home belonging to or owned by said defendants, or either of them, in White Pine County, Nevada, or elsewhere, at any time herein mentioned.

"(3) That the said premises, with the said dwelling thereon and the appurtenances, do not exceed in value the sum of \$5,000.

"(4) That this defendant has not, at any time since said premises and dwelling were acquired and occupied by these defendants as aforesaid, signed, executed, or delivered any instrument in writing mortgaging, conveying, or in any other way or manner conveying, alienating, or incumbering said premises and dwelling to any person or persons whatsoever.

"(5) That this defendant had no knowledge and no notice, at any time or at all, of the execution by her

husband of the deed dated the 7th day of September, 1907, nor the deed dated the 3d day of April, 1911, and described in plaintiff's complaint, and had no knowledge or information of the indebtedness for which the same or either of them was given."

The answer of the appellant W. E. Meyers, as well as his amended answer, alleged substantially the same facts, by way of affirmative defense, as did that of the appellant Dora Meyers. To the amended answer, no demurrer was interposed; but during the course of the trial the appellant W. E. Meyers was called as a witness in behalf of the defense, and offered to prove the facts alleged in sections 1, 2, 3, 4, and 5 of the appellant's amended answer. This evidence being objected to by respondent, and the objection thereto being sustained by the court below, the action of the court in thus sustaining the objection, and thereby refusing appellant Dora Meyers to prove those allegations of her affirmative defense as set forth in sections 1, 2, 3, 4, and 5 of her amended answer, is assigned as error in the appeal to this court.

Two primary questions are presented by this appeal:

First—Is the instrument of September 7, 1907, to wit, the deed from appellant Meyers to Witcher, and the instrument of April 3, 1911, as set forth above, void because the property in question is community property as defined by law, and said instruments were not executed by both appellants as husband and wife as required by section 2160, Revised Statutes, 1912?

Second—Does the evidence show, in this case, that the relationship of mortgagor and mortgagee existed between the parties hereto at the time of the commencement of this action?

**1, 2.** It will be unnecessary, in our judgment, to determine the second question.

In the consideration of the first question, our attention is drawn to two separate provisions of our constitution, which, while being of coordinate force, must be viewed, however, as having separate significance. Section 30, article 4, of the constitution, provides:

"A homestead, as provided by law, shall be exempt

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from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife when that relation exists; but no property shall be exempt from sale for taxes or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon; *provided*, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife; and laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated."

Pursuant to this directory provision of the constitution, the legislature in 1865 passed an act, entitled "An act to exempt the homestead and other property from forced sale in certain cases," section 1 of which is as follows:

"The homestead, consisting of a quantity of land, together with the dwelling house thereon, and its appurtenances, not exceeding in value, five thousand dollars, to be selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale on execution, or any final process from any court, for any debt or liability contracted or incurred after November thirteenth, in the year of our Lord one thousand eight hundred and sixty-one, except process to enforce the payment of the purchase money for such premises, or for improvements made thereon, or for legal taxes imposed thereon, or for the payment of any mortgage thereon, executed and given by both husband and wife, when that relation exists. Said selection shall be made by either the husband or wife, or both of them, or other head of a family, declaring their intention in writing to claim the same as a homestead. Said declaration shall state when made by a married person or persons, that they or either of them are married, or if not married, that he or she is the head of a family, and they or either of them, as the case may be, are, at the time of making such declaration, residing with their family, or with the person or persons under their care and maintenance on the premises, particularly describing said

premises, and that it is their intention to use and claim the same as a homestead, which declaration shall be signed by the party or parties making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded; and from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants; *provided*, that if the property declared upon as a homestead be the separate property of either spouse, both must join in the execution and acknowledgment of the declaration; and if such property shall retain its character of separate property until the death of one or the other of such spouses, then and in that event the homestead right shall cease in and upon said property, and the same belong to the party (or his or her heirs) to whom it belonged when filed upon as a homestead; *and, provided further*, that tenants in common may declare for homestead rights upon their respective estates in lands, and the improvements thereon; and hold and enjoy homestead rights and privileges therein, subject to the rights of their cotenants, to enforce partition of such common property as in other cases of tenants in common." (Stats. 1879, c. 131.)

That other provision of our constitution to which our attention has been drawn is section 31, article 4:

"All property, both real and personal, of the wife owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed, more clearly defining the rights of the wife in relation, as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property."

Pursuant to the directory provision in this section of our constitution, the legislature in 1873 passed an act entitled "An act defining the rights of husband and wife." (Section 2155, *et seq.*, Revised Laws, 1912.) By this act, it is provided:

"SECTION 1. All property of the wife, owned by her before marriage, and that acquired by her afterwards by

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gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property; and all property of the husband owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property.

"SEC. 2. All other property acquired, after marriage, by either husband or wife, or both, except as provided in sections 14 and 15 in this act, is community property."

Section 6 of the act of 1873 was amended by the legislature of 1897, and the section as amended reads:

"The husband has the entire management and control of the community property, with the like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate; *provided*, that no deed of conveyance, or mortgage, of a homestead as now defined by law regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatever unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate."

Respondent, in its brief, refers us to the several decisions of this court bearing upon the acts of our legislature defining homesteads and homestead rights: *Smith v. Stewart*, 13 Nev. 69; *Smith v. Shrieves*, 13 Nev. 327; *In Re Estate of Walley*, 11 Nev. 260; *Child v. Singleton*, 15 Nev. 461. But these decisions, having to do with the construction and application of homestead laws passed pursuant to the provisions of our constitution, we deem of little assistance in deciding the question here presented.

By the territorial statute of 1861, as construed and applied by this court in the case of *Goldman v. Clark*, 1 Nev. 607, residence alone was sufficient to constitute a legal homestead, and the husband had no power to sell or incumber it without the consent of the wife. By the constitutional provision, however (sec. 30, art. 4), the legislature of the state was enjoined to enact statutes with a view to the recording of homesteads; and it was

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with a view of meeting this requirement that the act of 1865, quoted *supra*, was passed.

In the case of *Child v. Singleton*, *supra*, this court, in discussing this legislation and the territorial act which was formerly in force, said:

"This law, while it does not expressly repeal the territorial law of 1861, has, in the opinion of the court, the effect of repealing it by implication. This being so, it follows that we have no other law on our statute book defining what a homestead is; and, since it is only the homestead 'provided by law' that cannot be alienated without the consent of the owner's wife (Const. art. 4, sec. 3), it follows that the homestead of these appellants, not having been selected by a recorded declaration of the claim (Comp. Laws, 186), was, at the date of the mortgage of plaintiff, subject to alienation by the husband alone."

From the expression of this court quoted above, it appears manifest that in that case the court held as it did by reason of the implied repeal of the territorial act of 1861, and would not have so held had the territorial act of 1861 remained in force and effect. The statute of 1897 was in effect a reenactment of the policy of the territorial act repealed by the statute of 1865. The homestead sought to be recognized and protected by the act of 1897 is not the homestead "provided by law" referred to and made a basis for the decision in the case of *Child v. Singleton*, *supra*, but is the homestead *de facto*, so to speak, created by its being the abiding place of the husband and wife. The very absence of a statute similar to that enacted in 1897 was what impelled the court to hold as it did in the case of *Child v. Singleton*.

Reference is made by respondent to the case of *Dunker v. Chedic*, 4 Nev. 378. The question there presented was as to the power of the legislature, under the constitution, to exempt the homestead from forced sale upon a lien created by husband and wife for a loan or other indebtedness. The court there had under consideration the validity of a statute which provided that:

"No mortgage or alienation of any kind, made for the purpose of securing a loan or indebtedness upon the homestead property, shall be valid for any purpose whatever," and the court there held that the legislature exceeded its powers in passing the law in question, for the reason that the statute in question sought to establish that certain provisions of exemption should apply to a lien created by husband and wife acting jointly, when the constitution expressly said they should not. The decision in that case rested squarely upon section 30, article 4, of the constitution.

The statute in question in the case at bar was enacted pursuant to the provision and mandate of our constitution, as set forth in section 31, article 4. The act in question, as its title implies, is an act defining the rights of husband and wife, and takes its authority, as well as its inspiration, from section 31, article 4, of the constitution. Section 6 of the act, as quoted above, amended as it was in 1897, is unquestionably within the mandate of section 31, article 4, expressed in the words:

"Laws shall be passed, more clearly defining the rights of the wife in relation, as well to her separate property, as to that held in common with her husband."

Section 6 of the act of 1873, as amended in 1897, and as set forth herein, clearly defines the rights of the wife in property held in common with her husband, where such property is the home or homestead *de facto*, the abiding place of the community created by the marriage relation. The case of *Dunker v. Chedic, supra*, is therefore to be distinguished from the case at bar.

As to whether or not the declaration of homestead, filed by the appellant Dora Meyers after her husband had made and executed the instrument in question, might be set up and interposed as a valid defense in this case we deem unnecessary to decide. What we do assume to determine is as to whether or not the court erred in denying the right of the appellants to prove the allegations of their affirmative contents set up in their amended answer, and as to whether or not these alleged facts, if



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proven, would constitute a valid defense sufficient to warrant the court in rendering judgment for appellants. The act of our legislature of 1873, as amended in 1897 (section 2155, *et seq.*, Revised Laws), is, as its title sets forth, an act defining the rights of husband and wife, and by section 6 of that act it is manifest that the policy sought to be established by the legislature was one that would preclude the possibility of a wife being divested of the home by the acts of her husband, perpetrated either with a design to defraud her, or through misguided or imprudent business transactions in which she had no part. In other words, the act was intended, both in spirit and letter, to protect the dependent ones of the family, and to secure to them the shelter of home, where such home had been acquired by the joint efforts and through the joint endeavor or industry of both spouses.

It has been stated that, as a general proposition of law, by virtue of the husband's sole right to control the community property, he may, in most jurisdictions where the community system obtains, alienate during the coverture, even without the consent or joinder of the wife, any of the property belonging to the community. (21 Cyc. 1666, and cases there cited.) Our attention has been drawn to no other state in which there exists a statutory provision of force or effect similar to that contained in section 2160 of our code. There is a provision in the act of the State of Washington to the effect that the husband shall have no right to sell or incumber the real property belonging to the community, unless the wife joins with him in the execution of the deed; and this statute has received the construction of the courts of last resort of the State of Washington in a number of cases, in each of which the statute has been upheld. (*Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030; *In Re Murphy's Estate*, 46 Wash. 574, 90 Pac. 916; *Holyoke v. Jackson*, 3 Wash. T. 235, 3 Pac. 841; *Hoover v. Chambers*, 3 Wash. T. 26, 13 Pac. 547.)

The matter set up by appellants in this case by way of affirmative defense averred the community character of the property in question, setting forth, in substance, that

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the same had been acquired and constructed out of moneys secured by the joint efforts of the appellant and his wife; that it was their home and the home of their family. Moreover, it was averred that these facts were at all times known to the respondent bank and to A. B. Witcher, its cashier. These averments, if established as facts, would be sufficient, in our judgment, to bring the case squarely within the statute prohibiting the husband from conveying or mortgaging the homestead without the execution and acknowledgment of the instrument by his wife. By the term "homestead," as used in section 6 of the code defining the rights of the husband and wife, it was unquestionably the intention of the legislature to bring the inhibition sought to be established, and the protection sought to be afforded, to bear on the community property actually occupied as a homestead, i. e., a place of abode "consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value five thousand dollars."

It is unnecessary for us to determine in this instance as to what limitations or extent, either from a standpoint of value or amount, the homestead contemplated by section 6 should embrace, so long as it did not exceed in value that amount set as a maximum by the homestead act as set forth in our statute, to wit, \$5,000. The statute provides a penalty, so to speak, for the making of an instrument mortgaging or disposing of the homestead premises by the husband without the action of his wife; and in this respect it declares the instrument to be void.

In the case of *Graves v. Smith*, 7 Wash. 14, 34 Pac. 213, the court held, under the statute of Washington, that a husband could not enter into a valid contract which would convey community real estate.

In the case of *Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791, it was held that a deed of land situate in another state, executed by a husband as grantor, without naming the wife as grantor, and without any acknowledgment on her part, was insufficient, even though the

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husband at the same time held a power of attorney from his wife.

In the case of *Hoover v. Chambers, supra*, it was held that a husband could not incumber community real estate, even by a lease, where such instrument was made by him alone, and that the same was void.

In *Re Murphy's Estate, supra*, it was held that, although there were recitals in a deed made to a husband, to the effect that the land was his separate property, such recitals could not affect the community character of the land, where it was purchased with community funds and the wife was not aware of the recitals; and, under such conditions, the husband could not dispose of the property in question without the cooperation of his wife.

In *Holyoke v. Jackson, supra*, the Supreme Court of Washington held that a contract for the sale of community property, entered into by the husband, was invalid where such contract was made or entered into without his wife's joining therein. Under such a condition, it was held that the vendee, having knowledge or notice of the fact that the subject-matter of the contract was real estate impressed with a community nature, could not recover damages for the husband's failure to execute the contract.

The case of *Sadler v. Niesz, supra*, is a most interesting case upon the subject, containing, as it does, separate opinions written by the three judges of the Supreme Court of Washington. The case is illuminative of the subject; and, while holding that, under conditions such as those presented in that case, the wife was estopped from setting aside transactions entered into by the husband when he had openly declared that he was not a married man, and when her absence tended to induce the community to believe in his representations in this respect, nevertheless the court in that case held that the spirit and intent of a statute similar to ours was beneficial and salutary, tending, as it did, to prevent the wife from being divested of that property which, by her efforts in combination with those of her husband, she had assisted

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in securing or creating. We deem the same reasoning to be applicable in the case at bar.

In the case of *Konnerup v. Frandsen*, 8 Wash. 551, 36 Pac. 493, the court held that the wife might be estopped from setting up title to the land, although community in nature, where an agreement for sale had been made at her request and with her full knowledge, acquiescence, and consent.

The conditions in the case at bar, as set forth by the record, contain none of the elements which, as we view it, would estop the appellant Dora Meyers from setting up in her answer the affirmative defense therein contained; and, if these averments were established, they would, in our judgment, constitute a valid defense.

The action of the court, in sustaining the objection to the evidence of the appellant Meyers tending to support this affirmative defense, was error.

For the foregoing reason, the judgment of the lower court and the order denying a new trial should be reversed.

It is so ordered.

NORCROSS, C. J.: I concur.

COLEMAN, J., having tried the case in the lower court, did not participate in the decision.

*Per Curiam:*

Petition for rehearing granted.

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## Argument for Respondent

[No. 2161]

H. H. PORCH, PLAINTIFF-APPELLANT, v. J. C. PATTERSON, ANNIE B. PATTERSON, AND GEORGE H. GREENFIELD, DEFENDANTS. ANNIE B. PATTERSON, DEFENDANT-RESPONDENT.

[156 Pac. 439]

## 1. APPEAL AND ERROR—CONDITIONAL AFFIRMANCE.

Where the principles of a case are controlled by the decision in a former case in which a petition for rehearing is pending, the decision rendered in the case at bar will be subject to further order, dependent upon the final disposition of the petition for rehearing.

APPEAL from the Fourth Judicial District Court, Elko County; *E. J. L. Taber*, Judge.

Action by H. H. Porch against J. C. Patterson and others. From a judgment for the defendants, plaintiff appeals. **Affirmed on conditions.**

*E. A. Klein*, for Appellant:

The signature of respondent to the mortgage was not necessary, under the constitution, as no written declaration of a homestead was ever filed by her. Section 30, article 4, of the constitution, required the legislature to enact laws providing for the recording of homesteads within the county in which they shall be situated; and in compliance therewith section 2142, Revised Laws, was enacted; and section 2160, Revised Laws, subsequently enacted, is void, being in violation of the direct and mandatory provisions of section 30, article 4, of the constitution.

*B. F. Curler* and *F. S. Gedney*, for Respondent:

Appellant's contention as to the law of homesteads has been repudiated by this court. (*Estate of Walley*, 11 Nev. 262; *In Re Cook's Estate*, 34 Nev. 217; *Goldman v. Clark*, 1 Nev. 607.)

A homestead, as provided by law, shall be exempt from any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists. (Const. Nevada, sec. 30, art. 4.)

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Section 2160, Revised Laws, is simply a limitation upon the power of the husband to alienate or encumber a certain kind of community property. Such power exists in the legislature, in the absence of a constitutional inhibition. (*Lies v. Diabler*, 12 Cal. 328; *Holyoke v. Jackson*, 3 Wash. T. 239, 3 Pac. 841; *Adams v. Black*, 6 Wash. 528, 33 Pac. 1074; *Gund v. Parke*, 15 Wash. 393, 46 Pac. 408; *Warburton v. White*, 174 U. S. 484, 44 L. Ed. 555.)

By the Court, MCCARRAN, J.:

This case presents the precise question involved in the case of *First National Bank of Ely v. Meyers*, 39 Nev. 235, 150 Pac. 308. Upon authority of that case the judgment will be affirmed.

We appreciate that the question involved in these two cases is of the greatest importance, not only to the parties to these two suits, but to the bar and the people generally. The learned junior justice, who files a dissenting opinion in this case, did not participate in the decision by this court in the Meyers case, *supra*. In the latter case there is now pending a petition for a rehearing. We have concluded not to determine the petition for a rehearing in the Meyers case until after the publication of the opinions filed in this case and opportunity afforded for any member of the bar to be heard *amicus curiæ* upon the question involved. We are advised that counsel for appellant in the case at bar has left the state, and whether he or other counsel for appellant appears further by way of petition for a rehearing in this case, the judgment now entered will be subject to further order dependent upon the final disposition of the petition for rehearing in the Meyers case, so that the final disposition of the two cases by this court will be the same.

The two points of view, relative to the proper construction to be placed on our constitutional and statutory provisions concerning homesteads and community property, are presented in the opinion heretofore rendered in the Meyers case and in the dissenting opinion in this case. The divergent views are worthy of most careful consideration, not only by the members of the court, but by the bar in

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Coleman, J., dissenting

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general. Subject to the conditions heretofore stated, the judgment is affirmed.

NORCROSS, C. J.: I concur.

COLEMAN, J., dissenting.

I dissent from the judgment in this case and from the views expressed in the Meyers case, which is the basis of the judgment in the case at bar, and because of the great importance of the questions involved, shall undertake to give the reasons which seem to me to fully justify my action.

While the opinion in the Meyers case correctly quotes the homestead act of 1879 (Stats. 1879, c. 131), we call attention at the outset to the fact that the act of 1879 was an amendment to section 1 of the homestead act of 1864-65. The original act of 1864-65 reads in part as follows:

"SECTION 1. The homestead, consisting of a quantity of land, together with the dwelling house thereon, and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale on execution, or any final process from any court, for any debt or liability contracted or incurred after November thirteenth, in the year of our Lord one thousand eight hundred and sixty-one. Said selection shall be made by either the husband or wife, or both of them, or other head of a family, declaring their intention, in writing, to claim the same as a homestead. Said declaration shall state that they, or either of them, are married, or if not married, that he or she is the head of a family, that they, or either of them, as the case may be, are at the time of making such declaration, residing with their family or with the persons under their care and maintenance on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead, which declaration shall be signed by the party making the same, and acknowledged and recorded as

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conveyances affecting real estate are required to be acknowledged and recorded, and from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants.

"SEC. 2. \* \* \* nor shall said homestead property be deemed to be abandoned without a declaration thereof in writing, signed and acknowledged by both the husband and wife, or other head of a family, and recorded in the same office, and in the same manner, as the declaration of claim to the same is required to be recorded. \* \* \*" (Stats. 1864-65, pp. 225, 226.)

It will be seen that the amendment of 1879 in no way affects the question involved in the case at bar. The amendatory act of 1879 did not amend section 2, quoted.

In territorial days, before the adoption of our constitution, there was what may be said to have been a *de facto* homestead; that is, the filing and recording of a statement claiming certain premises as a homestead was not necessary. (Stats. 1861, p. 24; *Child v. Singleton*, 15 Nev. 463.)

It is conceded that were it not for the act of 1897, amending section 6 of the act of 1873 (Stats. 1873, c. 119), defining the rights of husband and wife, the mortgage in question in the present case would be valid. It is the contention of appellant, as it was in the Meyers case, that section 30, article 4, of our constitution, which provides: " \* \* \* Laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated," is mandatory, and that, the legislature having passed an act in pursuance thereof, no subsequent legislature could repeal or amend the same so as to dispense with the filing of such homestead statement, so long as the constitutional provision quoted is in force. While in considering this case we must discuss several questions pertaining to the rules relative to the construction of statutory and constitutional provisions, it will all be solely for the purpose of an intelligent consideration



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and determination of the contention of appellant, as just stated.

Is section 30, article 4, of the constitution mandatory? Without discussing the question at all, the court in the Meyers case says: "Pursuant to the directory provision. \* \* \*" With all due respect for the learning and judgment of my associates, I must take issue with the statement just quoted. That constitutional provisions may be mandatory is clear. A most excellent work which is now being presented to the bench and bar of the country says:

"In the interpretation of constitutions questions frequently arise as to whether particular sections are mandatory or directory. The courts usually hesitate to declare that a constitutional provision is directory merely in view of the tendency of the legislature to disregard provisions which are not said to be mandatory. Accordingly it is the general rule to regard constitutional provisions as mandatory, and not to leave it to the will of a legislature to obey or disregard them. This presumption as to mandatory quality is usually followed, unless it is unmistakably manifest that the provisions were intended to be directory merely. The analogous rules distinguishing mandatory and directory statutes are of little value in this connection, and are rarely applied in passing upon the provisions of a constitution. So strong is the inclination in favor of giving obligatory force to the terms of the organic law that it has even been said that neither by the courts nor by any other department of the government may any provision of the constitution be regarded as merely directory, but that each and every one of its provisions should be treated as imperative and mandatory, without reference to the rules distinguishing between directory and mandatory statutes. Occasionally in the body of a state constitution there is inserted a declaration that its provisions are mandatory and prohibitory, unless by express words declared to be otherwise. The use of the word 'shall' is generally

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considered as an indication of the mandatory character of the provision." (6 R. C. L. p. 50.)

See, also, 8 Cyc. p. 762.

But we need not look further than our own court for authority to sustain the contention, for it was said, in *Dunker v. Chedic*, 4 Nev. on page 382, "Save that the legislature must obey the direct commands of the constitution. \* \* \*" In the opinion of the writer, it is not an open question in this state whether or not the constitutional provision under consideration is mandatory. In an opinion written by Chief Justice Beatty, concurred in by Justices Hawley and Leonard, conceded to have been the very ablest court the state has ever had, it is said:

"But by section 30, article 4, of the constitution, the legislature of the state was *enjoined* to pass laws providing for the recording of homesteads, and in pursuance of this *injunction*, the law of 1865 (requiring recording) \* \* \* was passed." (*Child v. Singleton*, 15 Nev. 463.)

This court, consisting of the same able jurists, speaking through the same judge, again says:

"That section is an enlargement and adaptation of section 9 of the homestead act of 1861, of which the whole act is simply a reenactment with some trifling alterations, and the addition of provisions for recording homesteads and declarations of abandonment, made, no doubt, for the purpose of carrying out the apparent purpose of the framers of the constitution to make registration of the homestead a condition precedent to its exemption, and to the disability of the owner to alienate or incumber it." (*Estate of Walley*, 11 Nev. 265.)

What plainer language could have been used? The court says it was the apparent purpose of the framers of the constitution to make registration of the homestead a condition precedent to its exemption. We are at an utter loss to conceive of words more emphatically stating the purpose of the framers of the constitution.

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Not content with the declaration last quoted, this court, composed of the same able expounders of the law, speaking through Mr. Justice Leonard, in *Smith v. Stewart*, 13 Nev. at page 69, reiterates its interpretation of the section mentioned, in the following words:

"It may be well to notice preliminarily, however, that at the session of the legislature of 1864-65 the constitution of this state was in force, and that section 30, article 4, *required* laws to be enacted providing for the recording of homesteads within the county in which the same should be situated. Such provision was made in section 1, statute of 1864-65."

Can there be any doubt as to the idea which the court meant to convey by the word "required"? Does it not clinch the contention that the constitutional convention made it mandatory upon the legislature to pass such a law?

Again, in *Smith v. Shrieves*, 13 Nev. at page 327, Judge Beatty, in expressing his dissent (from the judgment of the court upon another matter) says:

"There is no room for doubt that the occasion for enacting a new homestead law in 1865 was the requirement of the constitution, then newly adopted (art. 4, sec. 30), that laws should be passed providing for the recording of homesteads in the counties wherein they were situated. In compliance with this *injunction* of the constitution the California law of 1860 was copied."

"Upon still another ground we think there must be a decree against the defendants. This homestead right, if any such was acquired, must have been acquired under the act of March 6, 1865 (1 Comp. Laws, p. 60, sec. 186, *et seq.*), which so far as relates to the question involved, is a verbatim copy of the California act of April 28, 1860 (Stats. 1860, 311). Under the constitution of Nevada a homestead right is acquired 'as provided by law.' (Const. art. 4, sec. 30.) Now, the mode provided by law is as prescribed by the act of 1865 above cited. To secure the right there must be a declaration in writing, either by husband or wife, or

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both, making the claim and stating the matters required by that act, signed, acknowledged, and recorded as conveyances affecting real estate are required to be acknowledged and recorded, 'and from and after the filing for record of said declaration the husband and wife shall be deemed to hold said homestead as joint tenants'; that is to say, the character of the homestead attaches, and the estate takes its new characteristics as such from the date of this record. (*Smith, Administrator, v. Shrieves*, 13 Nev. 303.) The mortgage in this case was made and recorded long before the filing of the declaration of homestead. There can be no doubt, we take it, that if the Corbetts at the date of the mortgage had sold this property (block 56), taking their pay for it, and had executed a conveyance in fee, such conveyance could not have been defeated by any subsequent filing of a declaration of homestead by either husband or wife, or both, or, in other words, by any homestead right acquired after the making and recording of the conveyance. (*Hawthorne v. Smith*, 3 Nev. 182, 93 Am. Dec. 397; *Estate of Walley*, 11 Nev. 265.) If so, the mortgage cannot be defeated, for it was executed for a valuable consideration, when no homestead right had attached, 'as provided by law.' The object of the law requiring a declaration to be filed, among other things, 'particularly describing the premises,' was doubtless to give notice to parties dealing with the property, and till such notice parties could safely deal with it. This is not like a case of attachment or judgment lien. Those are but general lines imposed *in invitum* by the law. The party parts with no consideration to obtain them until he actually purchases at the sheriff's sale. The indebtedness has already been incurred without taking security, and the attaching or judgment creditor is only seeking to force himself, under the law, into a better position. Until he has purchased at the sale he has parted with nothing on the credit of the property. If a sale should actually take place before any claim of homestead is made, I apprehend a

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title would pass, notwithstanding a subsequent claim of homestead should be made with all the forms of law. This seems to be the view of the law taken by the Supreme Court of Nevada in *Hawthorne v. Smith*, *supra*. But in making this mortgage there was the consent of the party, and the mortgage was given in consideration of the money advanced. The money was advanced on the credit of the property and the mortgagee stands in the same position that a *bona fide* purchaser taking a conveyance in fee would occupy. The property, under the constitution and laws, had not then been impressed with the character of a homestead. Such was the construction actually given to the California act before it was adopted by Nevada, and the construction, being most reasonable, may be presumed to have been adopted with the language of the statute; and such is the sound reason of the thing. (*Cohen v. Davis*, 20 Cal. 187; *Gluckauf v. Bliven*, 23 Cal. 312.) None of the defendants having established a homestead right superior to the mortgage, there must be a decree in favor of the complainant." (*Com. & Sav. Bank of San Jose v. Corbett*, 5 Sawy. 543, Fed. Cas. No. 3058.)

Thus it will be seen that not only did the legislature which followed on the heels of the constitutional convention construe the provision in section 30, article 4, of the constitution as being mandatory, but every judge who lived at the time of the holding that convention, who drank inspiration from it, and who had occasion to consider the question, also so construed it.

But the Meyers case practically reverses the former decisions of the court, without discussing them at all. We are therefore called upon to consider if the court is justified in so doing. In the first place, it seems to the writer that opinions from a court composed of such able jurists as Justices Beatty, Hawley, and Leonard are conceded to have been are entitled to consideration and an analytical discussion before they are overruled; otherwise it is an open question whether or not the court really intended to overrule the decisions

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mentioned; but, since the decisions alluded to were called to the attention of the court in the Meyers case by the brief of counsel for respondent, we can but infer that it was the intention of the court to reverse the former decisions. However, let that be as it may, we will consider the propriety of adhering to the rule formerly well established by the authorities referred to. It is a well-known and universally acknowledged rule for the guidance of courts in the interpretation of statutory and constitutional provisions that the intent of the framers of the section to be construed must control. (*Mighels v. Eggers*, 36 Nev. 364, 136 Pac. 106; *State v. Brodigan*, 37 Nev. 250, 141 Pac. 988.) No doubt this is why it is also held that:

“Contemporaneous and practical construction of constitutional provisions by the executive and legislative departments of the government will be considered by the courts in passing upon constitutional questions.” (8 Cyc. 736.)

“‘Great regard,’ says Lord Coke, ‘ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time when the law was made.’” (Dwarris on Statutes, 2d ed. 1848, p. 562.)

“The presumption is that those who were the contemporaries of the constitution makers have claims to deference of later tribunals because they had the best opportunities of informing themselves of the understanding of the framers, and of the sense put upon the constitution by the people when it was adopted.” (6 R. C. L., p. 63.)

In *Labadie v. Smith*, 41 Okl. at page 779, 140 Pac. at page 430, the court quotes:

“The construction placed on statutes or constitutional provisions by officers in the discharge of their duties, either at or near the time of the enactment, which has

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been long acquiesced in, is a just medium for the judicial interpretation."

See, also, *Logan v. Davis*, 233 U. S. 613, 34 Sup. Ct. 685-690, 58 L. Ed. 1121; *State v. Brodigan*, 35 Nev. 39, 126 Pac. 682.

The contemporaneous interpretation of the legislature of section 30, article 4, of the constitution was manifested by its enactment at its session in 1864-65 of a law requiring the recording of the declaration of the selection of the homestead. The legislature evidently construed that section of the constitution as an injunction upon it to pass such a law. Not only was that legislature imbued with that idea, but so was this court, as is manifest from the decisions from which we have quoted.

And that the full force of the rule contended for may be appreciated, it should be borne in mind that the constitutional convention adjourned July 27, 1864, and that the first legislature thereafter, and the one which enacted a law requiring the recording of a declaration of the selection of a homestead, convened December 12 of the same year. The decision in *Estate of Walley*, *supra*, was rendered in 1876, about twelve years after the constitutional convention had adjourned, and the other decisions not very long thereafter. Thus it would seem that if the intent of the constitutional convention, as interpreted by the legislature of 1864-65, and by this court a few years later, should control, as seems to be in accord with judicial expressions, the courts of the state at this day are bound to adhere to the holding that the portion of section 30, article 4, of the constitution quoted above is mandatory.

But had there been no judicial expression on the point by this court, I am constrained to believe that every reasonable consideration justifies this court at this time in holding that the portion of the constitution in question is mandatory. This statement opens up for investigation the intent of the constitutional convention in

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incorporating in the constitution the language quoted. In considering this phase of the case, it might be well to have in mind the fact that if the amendment of 1897, *supra*, is valid, it works a practical return to the situation which existed before the adoption of the constitution (when no recording was required), and to inquire what the reason was which induced the constitutional convention to adopt the mandatory provision of section 30, article 4, of the constitution, requiring that the legislature pass a law providing for the recording of the homestead selection. If the law as it then stood was satisfactory; if it protected all persons from fraudulent practices — what good could have been accomplished by a change? The conclusive presumption must be that some strong reason animated the constitutional convention, because not a dissenting voice was raised in protest against the provision relating to recording. As is said in *Beal on Cardinal Rules of Legal Interpretation*, at page 274:

“Among the things which have passed into canons of construction recorded in Heydon’s case (1584), 3 Rep. 18, pt. III, 7b, we are to see what was the law before the act was passed, and what was the mischief or defect for which the law had not provided, what remedy parliament appointed, and the reason of the remedy. (*Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs and Trademarks*, 1898, A. C. 571, at page 573; 67 L. J. Ch. 628, at page 630, Earl of Halsbury, L. C.)”

See, also, 26 Am. & Eng. Ency. Law (2d ed.) p. 632; *Maynard v. Johnson*, 2 Nev. 27; 6 R. C. L. p. 50.

Courts are governed by the same rules in construing both statutes and constitutions. (*State v. Arrington*, 18 Nev. 414, 4 Pac. 735.)

Now, it may be good deal a matter of guesswork for us at this distant day to say exactly what evil the constitutional convention sought to remedy in providing



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for the passage of an act requiring the recording of a homestead selection, but that does not lessen the impression that there was some well-grounded reason for the action. Hon. Charles E. De Long, who was a conspicuous figure in the constitutional convention, in one of his speeches in that body said:

"If he commences at that figure, and files his declaration, he will not obtain credit upon that property which he has set apart as his homestead. He gives notice to the world, by the act of recording his homestead, that that property cannot be touched to pay his debts, and then nobody is defrauded. Nobody can lose a dollar by it, because every business man will understand that that homestead is no basis upon which he can give the man credit, and if he owns nothing aside from that, he has no basis upon which to obtain credit except his honor." (Nevada Const. Deb. and Proc. p. 285.)

He again says:

" \* \* \* Then I file my declaration claiming it as a homestead." (Id., p. 286.)

The views thus expressed were accepted without question. Thus we see that the purpose of the constitutional convention, as clearly expressed, was to prevent fraud, which carries the implication that events had proven that the law as it then existed did not do so.

Without indulging at length in speculation, we may with profit show one danger that might flow from sustaining the judgment of the lower court, by an illustration which has been suggested to our mind. It might transpire in many cases that while the record title to real property, as would appear from an abstract of title, would be perfect, nevertheless a pitfall would lurk unnoticeable. Suppose title to a city lot ran to John Smith alone seventeen years ago. Three months later he conveyed to his successor by a deed showing neither the signature nor existence of Smith's wife. Thereupon, like others who have momentarily touched the

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affairs of our state and departed, he left for parts unknown, and nothing has been heard of him since. Although the record title to the property may be as straight as a string, capital, knowing the shoals ahead, will falter and ask, "Did Smith have a wife at the time of his conveyance?" The best, possibly, that can be furnished in answer to this question is vague neighborhood repute of years ago. If he was married at that time, did his wife live with him on the premises when Smith executed the deed? To answer this it may be ascertained by again consulting the old neighbors that some old woman lived with Smith on the place, but whether wife, sister, housekeeper, or some other they were never able to determine—the occupants were of a reticent and incommunicative disposition. These questions indicating doubt and uncertainty and title chaos, may be indefinitely multiplied. It is learned that during the same period Smith owned a little farm outside the city, and those of his neighbors who still live and can be found may recollect that Smith and the woman referred to spent a portion of their time in the city and a portion on the farm. Which is the homestead *de facto*? Are both such? If we do away with the selection by recording, which the constitution contemplated and the statute of 1864–65 carried out, we are in doubt as to which in legal contemplation was the homestead (*de facto*) as well as when such a legal characterization properly terminated. The early statute makes clear what shall be necessary to constitute an abandonment of the homestead, viz, a declaration of abandonment in writing signed and acknowledged by both spouses and recorded in the same office, and in the same manner, as the declaration of claim to the same is required to be recorded. Is this now the law, if, as the opinion in the Meyers case states, "the statute of 1897 was in effect a reenactment of the policy of the territorial act repealed by the statute of 1865"? If it is, it seems foolish to

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require a record of the abandonment and not of the claim of homestead itself. If it is, and an abandonment be recorded, how soon thereafter may the homestead *de facto* be reestablished by resuming residence on the premises or, indeed, by simply continuing to reside thereon? If it is not, what would constitute an abandonment of the claim by Smith and his spouse, and how shall a record thereof be made so that in after years it may be proved and the validity of the Smith deed established.

Speculation aside, we need not search far for at least one motive which probably animated the constitutional convention. That body was composed of 39 members, 33 of whom came from California to Nevada between 1856 and 1864. The legislature of California, in 1851, passed a homestead act in which no provision was made for recording the homestead selection (Stats. Cal. 2d Sess. 1851, p. 296.) In the case of *Reynolds v. Pixley*, 6 Cal. 165 (decided at the April term, 1856), it is said:

"Before leaving this case we feel constrained to express our regret that the legislature has failed to provide that notice of homestead should, in all cases, be recorded. Such a law would do away with all the difficulties which now embarrass these rights, and be found a wise and salutary barrier against deceit and dishonesty. As the law now stands, so far from accomplishing the end designed, it is a fruitful source of fraud and perjury, and will eventually lead to more mischief than all the other difficulties which embarrass real property in this state. These rights are so illy defined, that it is almost impossible for human foresight to detect or guard against them; and much of the property of this state, which has passed through many hands, will eventually be found incumbered to its full value with these unrecorded liens."

The legislature of California, in 1860 (Stats. 1860, p. 311), evidently because of the language quoted from

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the California case, amended the act of 1851 so as to make necessary the recording of the homestead. Thus it can be easily seen that in all probability the constitutional convention of Nevada, in providing for the passage of a law making necessary the recording of the homestead selection, was, to some extent at least, animated by the words of the Supreme Court of California and the action of the legislature of that state.

Furthermore, since there is no conflict between sections 30 and 31, article 4, of the constitution, we think this court has passed upon substantially the identical question now before us in the case of *State v. Arrington*, 18 Nev. 412, 4 Pac. 735. In that case the question involved was whether or not the legislature could fill an office, in view of the language of the constitution, which provides for the election of public officials by the people. The court said:

“But in seeking for limitations and restrictions, we must not confine ourselves to *express* prohibitions. Negative words are not indispensable in the creation of limitations to legislative power, and, if the constitution prescribes one method of filling an office, the legislature cannot adopt another. \* \* \* For instance, it is declared in section 32, article 4, that the legislature shall provide for the election by the people of certain officers named. There are no negative words employed to the effect that the legislature shall not elect or appoint them, or provide for their election or appointment in some other way; still no one would claim that a law providing for their election or appointment by a different mode would be constitutional. In fact, counsel for respondents admit that it would not be.

“\* \* \* On the contrary, section 32 of article 4 plainly shows an intention to leave it to the legislature whether officers other than those specifically named are required, and if they are, power is given to create

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them and to make provision for filling them, provided only that the incumbents shall be elected by the people. \* \* \* The upshot of the whole matter is this: The framers of the constitution decided for themselves that the officers named were necessary and should be elected by the people; but they left it to the legislature to decide as to the necessity of additional ones, whether state, county, or township, requiring only that they, like those named, should be elected by the people."

To bring out clearly the force of the opinion cited, we will paraphrase the language quoted, the interpolated words being italicized:

"But in seeking for limitations and restrictions, we must not confine ourselves to express prohibitions. Negative words are not indispensable in the creation of limitations to legislative power, and, if the constitution prescribes one method of *creating a homestead*, the legislature cannot adopt another. \* \* \* For instance, it is declared in section 30, article 4, that the legislature shall provide for the *recording of homesteads*. There are no negative words employed to the effect that the legislature shall not *provide for homesteads without requiring them to be recorded*; still no one would claim that a law providing *homesteads and prescribing that they need not be recorded would be constitutional*. \* \* \* On the contrary, section 30, article 4, plainly shows an intention to leave it to the legislature *what the value and extent of homesteads should be*, and power is given to create them and to make provision for *the formalities which shall attend them*, provided only that they shall be recorded. \* \* \* The upshot of the whole matter is this: The framers of the constitution decided for themselves that *homesteads were necessary and should be recorded*; but they left it to the legislature to decide as to the necessity of *other formalities and as to the value and extent of the homestead*."

If the judgment appealed from should be sustained,

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what would be the effect as applied to other portions of the constitution? Section 25, article 4, of the constitution (Rev. Laws, 283) reads:

"The legislature shall establish a system of county and township government which shall be uniform throughout the state."

Section 26, article 4 (Rev. Laws, 284), reads:

"The legislature shall provide by law, for the election of a board of county commissioners in each county, and such county commissioners shall jointly and individually perform such duties as may be prescribed by law."

We have quoted two successive sections of the constitution, in each of which is embodied instructions to the legislature; and, if the theory of respondent is correct, what is to prevent the legislature, under the powers given it by section 25, from providing for the appointment of boards of county commissioners instead of their election? Or, again, what shall prevent the legislature, under section 26, from violating the provision of section 25 as to uniformity by prescribing different duties for the boards of the various counties? Further illustrating our view, section 32, article 4, of the constitution (Rev. Laws, 290) deals with the legislative power over certain county officers, and provides:

" \* \* \* The legislature shall provide for their election by the people, and fix by law their duties and compensation" (an instruction to the legislature, as in the section relative to homesteads).

If the theory of respondent is sound, under section 25, article 4, above mentioned, the legislature might violate section 32, just quoted, by providing that one or more of the county officials specified in section 32 be appointed by the governor, instead of being elected by the people. But that this cannot be done, see the Arrington case, *supra*.

Other similar illustrations might be given, but to do so would unduly prolong this opinion.

The court, in the case of *Morris v. Powell*, 125 Ind. 292, 25 N. E. 224, 9 L. R. A. 326, had under consideration

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substantially the same question involved here, wherein it was said:

"It is a well-settled rule of law that 'when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference, to add to the condition or to extend the penalty to other cases.' This language of Judge Cooley is quoted with approval by the court in the case of *Quinn v. State*, *supra*, 35 Ind. 485, 9 Am. Rep. 754. See, also, *Mech. Pub. Off.* sec. 148; *State v. Williams*, 5 Wis. 308, 68 Am. Dec. 65, *supra*; *State v. Tuttle*, 53 Wis. 45, 9 N. W. 791. In other words, when the constitution commands how a right may be exercised, it prohibits the exercise of that right in some other way. If exercised at all it must be exercised as commanded by the constitution."

"A state constitution is also binding on the courts of the state, and on every officer and every citizen. Any attempt to do that which is prescribed in any other manner than that prescribed, or to do that which is prohibited, is repugnant to that supreme and paramount law, and invalid." (6 R. C. L. p. 40.)

Other instructive cases on this question are: *Keller v. State* (Tex. Cr. App.) 87 S. W. 669, 1 L. R. A. n. s. 489; *Water Co. v. Covington*, 156 Ky. 569, 161 S. W. 988; *Atkinson v. Board*, 18 Idaho, 282, 108 Pac. 1046, 28 L. R. A. n. s. 412; *State v. Railway Co.*, 253 Mo. 642, 162 S. W. 144; *State v. Moores*, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624; *State ex rel. Crumb v. Mayor*, 34 Mont. 67, 85 Pac. 744; 8 Cyc. 741; *State v. Butler* (Fla.) 69 South. 771.

It is contended that, pursuant to section 31 of article 4 of the constitution, the legislature had the right to amend section 5 of the act of 1873, as was done by the legislature of 1897, as quoted in the Meyers case. In construing constitutions and statutes there is no more familiar rule than the one requiring that, where possible, effect be given to every word.

"It is an elementary rule of construction that effect

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must be given, if possible, to every word, clause, and sentence of a statute. In other words, a statute must receive such construction as will make all its parts harmonious with each other, and render them consistent with its general scope and object." (*Ex Parte Prosole*, 32 Nev. 383, 108 Pac. 632; *Torreyson v. Board*, 7 Nev. 22; *Heywood v. Nye County*, 36 Nev. 571, 137 Pac. 515.)

In considering the subject of construction of constitutions, it is said:

"In construing a constitutional provision it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision; and, if there is an apparent repugnancy between different provisions, the court should harmonize them, if possible. Frequently the meaning of one provision of a constitution, standing by itself, may be obscure or uncertain, but is readily apparent when resort is had to other portions of the same instrument. It is therefore an established canon of constitutional construction that no one provision of the constitution is to be separated from all the others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument. \* \* \*

Another elementary rule is that, if possible, effect should be given to every part and every word, and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous. Hence, as a general rule, the court should avoid a construction which renders any provision meaningless or inoperative." (6 R. C. L., pp. 47, 48.)

On the same point Cyc. says:

"The whole instrument is to be examined with a view to ascertaining the meaning of each and every part. The presumption and legal intendment is that each and every clause in a written constitution has been inserted for some useful purpose, and therefore the instrument must be construed as a whole in order that its intent



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and general purposes may be ascertained; and, as a necessary result of this rule, it follows that wherever it is possible to do so, each provision must be construed so that it shall harmonize with all others, without distorting the meaning of any such provision, to the end that the intent of the framers may be ascertained and carried out and effect given to the instrument as a whole." (8 Cyc. p. 730.)

Now it is clear that if effect is to be given to section 31, article 4, of the constitution, as held in the Meyers case, that portion of section 30, article 4, of the constitution providing for the passage of a law requiring the recording of a declaration of homestead is nullified. This cannot be done if the rule of construction which we have invoked is still operative, as we understand it to be.

Can it be said that, even though that portion of section 30, article 4, of the constitution in reference to the passing by the legislature of a law providing for the recording of a declaration of homestead is mandatory, and that a legislature complied with that mandate, a subsequent legislature can nullify the command of the constitution by passing another law, in conflict with the law passed in pursuance of such mandate? We think not.

We would be willing to concede that if there were an irreconcilable conflict between sections 30 and 31, article 4 of the constitution, probably the latter section would control; but there is no conflict between them. Consequently we are of the opinion that, while the legislature can pass laws defining the rights of the wife to the community property, such laws must be confined in their scope within such limitations as not to conflict with a law passed in pursuance of a mandatory provision of the constitution, and when such laws are passed they are valid. But when a law is passed which in its scope is in conflict with one enacted in pursuance of such mandatory provision of the constitution, it is void.

As an illustration, suppose there were no laws in the

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state against gambling; that the legislature passes an act incorporating the city of Reno, and by section 30 of the act provides that there shall be no faro played in said city, and that the city council shall pass an ordinance making the playing of faro a misdemeanor, punishable by a fine; that by section 31 of said incorporation act it is provided that the city council shall pass an ordinance regulating gambling in said city; that in pursuance of section 30 the city council passes an ordinance making the playing of faro a misdemeanor, and fixing the punishment at a fine of \$500 for each offense; that subsequently the city council passes an ordinance regulating gambling in said city, by the terms of which it is provided that the city may license individuals to carry on gambling of all kinds on Virginia Street between the hours of 6 p. m. and 6 a. m. Would any one have the temerity to urge that such an ordinance would be valid as to the game of faro? We think not, and for the reason that the legislature makes it mandatory upon the city by the act of incorporation to pass an ordinance prohibiting faro, and such mandate having been carried into effect, it cannot be nullified by another ordinance in conflict with it, for the reason that the act of incorporation is the very foundation of the city organization, and all of its ordinances must be subordinated to the act bringing the city government into existence. So, in the case at bar, the constitution is the very foundation of our state government, and while by section 31 power is given the legislature to pass a certain law, it cannot be supposed that the framers of the constitution presumed that the scope of the law passed in pursuance thereof would be in conflict with a mandatory provision of section 30 of the constitution, but in harmony with it. It is well said in *State v. Butler* (Fla.) 69 South. at page 781:

“Where a constitutional provision will bear two constructions, one of which is consistent with, \* \* \* an intention expressed clearly in a previous section, the

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former must be adopted, that both provisions may stand and have effect" (citing *Chance v. County of Marion*, 64 Ill. 66).

Being convinced that the former decisions of this court, in which it was held that the provision of section 30, article 4, of the constitution is mandatory, are sound, and that there is no irreconcilable conflict between sections 30 and 31 of said article 4, I see no way of escaping the force of the language used by Beatty, C. J., in *State v. Hallock*, 14 Nev. on page 205, 33 Am. Rep. 559, where he said:

"It is true that the constitution does not expressly inhibit the power which the legislature has assumed to exercise, but an express inhibition is not necessary. The affirmation of a distinct policy upon any specific point in a state constitution implies the negation of any power in the legislature to establish a different policy. 'Every positive direction contains an implication against anything contrary to it which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance.' (*People v. Draper*, 15 N. Y. 544.) The presumption is always that the positive provisions of a constitution are mandatory and not merely directory (*Cooley's Const. Lim.* 78, 79), and there is nothing to overthrow this presumption with respect to the provisions under discussion."

See, also, *State v. Gas Co.*, 15 Ariz. 294, 138 Pac. 781.

The court in the Meyers case cites several decisions from the State of Washington to the effect that the husband could not convey the real property belonging to the community unless the wife joined. We have no fault to find with those decisions; but in none of those cases was there involved the constitutional question presented in the Meyers case and in the case at bar, and

## Argument for Appellant

consequently they are of no weight in determining the question demanding our consideration.

Since that portion of section 30, article 4, of the constitution, requiring the legislature to pass laws providing for the recording of the selection of a homestead, and the passing of an act in pursuance thereof, was mandatory and not in conflict with section 31 of that article of the constitution, I am of the opinion that the amendment of 1897, which is quoted in the Meyers case, is void, and that the judgment of the lower court should be reversed.

[No. 2184]

CHARLES J. GAULT, RESPONDENT, v. JAMES  
GROSE, APPELLANT.

[155 Pac. 1098]

1. EVIDENCE—AFFIRMATIVE DEFENSE.

To maintain an affirmative defense it must be established by a preponderance of the evidence.

2. APPEAL AND ERROR—REVIEW—SUFFICIENCY OF EVIDENCE.

An appellate court is reluctant to disturb the trial court's judgment on the ground that the evidence does not justify it, and will not do so except where there is no substantial evidence to support it.

3. WATERS AND WATERCOURSES—IRRIGATION—LICENSE—EVIDENCE, SUFFICIENCY OF.

Evidence in an action to enjoin defendant's use of a ditch to conduct water to his ranch, in which defendant claimed an irrevocable license to use the ditch, *held* to justify a judgment for the plaintiff.

APPEAL from Second Judicial District Court, Washoe County; *Cole L. Harwood*, Judge.

Action by Charles J. Gault for an injunction against James Grose. Judgment for plaintiff, motion for new trial denied, and defendant appeals. **Judgment and order affirmed.**

*L. B. Fowler* and *James D. Finch*, for Appellant:

Appellant proved conclusively the existence of an irrevocable license. The use of the ditch was open and

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visible, and known to the owners of the property; and respondent is estopped at this time from denying to the appellant the privilege of using the ditch, which would result in reducing the value of the latter's land and make a portion of it absolutely worthless. Equity will not permit acts which are fraudulent and unjust. (*Gustin v. Harting*, 121 Pac. 522; *Maple Orchard G. & V. Co. v. Marshall*, 75 Pac. 371; *Wiel on Water Rights*, 3d ed. vol. 1, p. 601, secs. 556, 557.)

*Summerfield & Richards*, for Respondent:

The evidence does not show an irrevocable license, but merely permission to appellant from successive owners of the land to make use of the ditch from time to time, as an accommodation. (*Ewing v. Ray*, 62 Pac. 790; *Farnum on Waters*, vol. 3, p. 2317; 25 Cyc. 646.)

The waters claimed by appellant are waste waters, and the law is well settled that title to waste waters cannot be acquired by appropriation and use thereof. (*Bidleman v. Short*, 38 Nev. 467.)

By the Court, COLEMAN, J.:

Respondent obtained a judgment in the district court restraining appellant from using a certain ditch through which to conduct water upon his ranch, and from said judgment this appeal was taken.

The lands owned by both parties consist of three 40-acre tracts, and originally belonged to one Bryant, who sold the southernmost tract to a man named Vance, which was finally acquired by appellant. The other two 40's lying north of the tract owned by appellant were sold by Bryant to one Matthews, and from him passed through several others to respondent. Both appellant and respondent are stockholders in the Orr Extension Ditch Company, which owned a ditch that was operated along the northerly line of respondent's northernmost tract, and, as such stockholder, are entitled to a certain amount of water from said ditch company for irrigation and domestic purposes. Since appellant's land is separated from the

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ditch owned by the Orr Extension Ditch Company by two 40-acre tracts, the question of conducting the water from said Orr ditch to appellant's land is one which demanded solution by appellant and his predecessors in interest from the time the land was acquired by Vance. The ditch in question is on the west line of the respondent's ranch, running in a southerly direction.

To the complaint of respondent appellant filed an answer pleading several defenses, but only one of them is relied upon in this court, viz, an irrevocable license to use the ditch in question.

This may be said to be a most unusual case, in that there is no dispute as to the rule of law relied upon by appellant; and, although the testimony consists of about 6,000 words, both parties assert that the evidence is singularly free from conflict; each claiming, however, that the testimony should be construed so as to sustain his contention. It will thus be seen that the only way to arrive at a conclusion as to the disposition which should be made of the case on this appeal is by reading every word of the testimony. This we have done.

Mr. Bryant, the original owner of the land now owned by both parties to this action, prior to selling any of the land, constructed a ditch on the westerly line of the land so owned by him to a point within a short distance of the 40-acre tract now owned by appellant, which he used for the irrigation of the two 40-acre tracts now owned by respondent. Vance having sold the 40-acre tract to one Wills, the latter negotiated with and obtained from Bryant a deed granting a right of way parallel to said ditch for a pipe line to conduct water from the Orr Extension ditch to the land then owned by him, and now owned by appellant.

The chief testimony in behalf of appellant to sustain his contention is as follows:

"Examination of appellant: Q. Well, you did what with the ditch? A. Did what with the ditch?

"Q. Yes. A. Went and cleaned it out for a while, a year or so. The ditch was there, and I went to Mr.

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Matthews and I said: 'Mr. Matthews, I want to clean that ditch and get water through that ditch.' I think it is twelve years ago this coming July he told me I could clean the ditch, and I have been cleaning and keep of it in repair from that day to this.

"The Court—Who is Mr. Matthews? A. He is the man that bought the ranch from Mr. Bryant.

"The Court—He owned the ranch at that time? A. He did at that time; yes, sir.

"Mr. Fowler—Q. Mr. Matthews was in possession and was the owner of the land now held by Charles J. Gault; is that correct? A. Yes.

"Q. How long was he the owner and in possession of that land, if you know? A. I think it must be fourteen years ago since he took possession of that.

"Q. How long was he there? A. He was there, I think it is six or seven years.

"Q. And who succeeded him as the owner of the property, if you know? A. Mr. Avansino bought Mr. Matthews out.

"Q. And then who succeeded Mr. Avansino? A. Mr. Capurro.

"Q. Who succeeded Mr. Capurro? A. Mr. Victor.

"Q. Who succeeded Mr. Victor? A. Mr. Gault.

"Q. How long ago did Mr. Avansino enter upon that property? A. Two years ago last February I think was the first I hear of him; two years ago last February since he came on the property. I was in peace and quietness up to that time. We worked together; cleaned the ditch together. Mr. Victor dared me to go in the ditch, and I wanted to know the reason I couldn't go in and do as I had been doing for years previous to that. I says: 'I have been getting water through this ditch, been cleaning it and keeping it up every year for ten years.' I had been doing that before Mr. Victor or any one interfered with me in regard to cleaning the ditch or getting water from it.

"Q. What has been the nature of your use of the disputed ditch in regard to the quantity of water? A.

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Why I couldn't irrigate some parts of my land without that ditch.

"Q. Have you used that ditch every year during the time you have been on your property in practically the same way? A. I have cleaned it out, Mr. Fowler.

"Q. You have cleaned that ditch? A. I cleaned that ditch; started to clean the ditch twelve years ago this coming July, but the water was coming down before I cleaned it at all."

On cross-examination he testified:

"Q. Did you ever have a conversation with Mr. Matthews to be permitted to take water through that ditch for the purpose of permitting you to give your stock a drink through the winter? A. Never after we talked at the ditch. My place was dry in the winter time because it couldn't come through that ditch and the water was going in the drain ditch.

"Q. In that conversation did you say to Mr. Matthews that you wanted some water for your cattle during the winter? A. I said during the winter season I had to drive my cattle from the place to water them, and I cleaned the ditch out and put in a box. I took it to the house where the box used to be at Mr. Vance's time. They were rotted out.

"Q. You say the box on your land, the boxes, had rotted out on that ditch during Mr. Vance's time? A. Yes; through the low lands.

"Q. Through the low lands? A. Yes; the lowest spot; it was in my land.

"Q. That conversation that you refer to with yourself and Mr. Matthews you asked Mr. Matthews for permission to take water through that ditch, did you, for winter so you could water your stock, didn't you? A. Winter was never mentioned. I took it through in July month. Is that winter month?

"Q. Did you ask Mr. Matthews then and there to take water through that ditch to water your stock? A. In July month?

"Q. When you had that conversation? A. I told Mr.



Matthews that in the winter time I had no water for my stock, and I could clean that ditch out and get water through it, and he told me I could, and I turned the water in that ditch in July month. Mr. Matthews didn't come and say, 'Stop that water,' nor never did any other man up to the present time, but Mr. Gault and Mr. Victor.

"Q. But you did tell Mr. Matthews at that time that in the winter you had to drive your cattle or stock off the ranch to water them? A. I had no other way.

"Q. Did you tell him that? A. I didn't tell him that I drove my cattle off, but I had to do so.

"Q. For what purpose? A. For to water them.

"Q. What did you ask Mr. Matthews? Why did you ask Mr. Matthews to allow you to take water through that ditch? A. Because I didn't understand about it. I know the ditch was there, and, knowing that Mr. Matthews was supposed to own that ranch above me, I went to him like a man and asked him permission to clean that ditch and get water through it. I didn't want to go in and jump before I knew what I was jumping about.

"Q. You received permission from Mr. Matthews to take water through that ditch? A. I did.

"Q. Did you have any other conversation with Mr. Matthews about taking the water through that ditch? A. Never."

Respondent, to rebut the contention of the appellant, introduced the following, with other testimony:

"Examination of Mr. Matthews: Q. When you went on the ranch was that ditch leading from your ranch to the Grose ranch open or closed? A. It was closed when I went on the ranch.

"Q. How was it closed? A. It was just grown up with weeds, rushes, and the banks fallen in, sort of showing evidence of disuse for a long time.

"Q. At that time was there any water going through your ditch into the lands of Grose? A. No, sir.

"Q. Was the extension of your ditch onto the lands of Grose ever opened in your time? A. Yes.

"Q. Under what circumstances was that extension

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opened? A. In the fall of 1902 I think Mr. Grose asked permission if he might use the ditch in the winter time to take water down to his premises; I think he said for the purpose of watering his stock in the winter time.

"Q. Now that was Mr. Grose, the defendant in this case? A. Yes.

"Q. To the best of your recollection, I want you to state all the conversation that then occurred between yourself and Mr. Grose. A. I don't remember any more than just the request to use the ditch to carry a small amount of water throughout the winter time down to his premises, and that he might take it out of my gate on the Extension ditch.

"Q. Did you give him that permission? A. I did.

"Q. Did he state at that time what he wanted the water for? A. I think he did; I think he said it was to water his stock.

"Q. After you gave him that permission, what, if anything, did Mr. Grose do upon his lands in connection with your ditch; I mean immediately after. A. I don't think he did much of anything.

"Q. Did he have to clear the extension to the ditch? A. He had to clear it out before he could get the water through.

"Q. Do you mean to say that the extension of that ditch had to be cleaned out before water would flow into it? A. That is what I understand; yes.

"Q. Had reeds grown up and grasses? A. Yes.

"Q. Upon your land or near thereto had your ditch been blocked up or backed up before you gave that permission? A. I cannot remember whether it was; whether there was any dam put in there or not. The water didn't seem to have any tendency to flow that way; so I don't think there was any necessity for a dam.

"Q. But from your recollection the extension of that ditch had to be cleaned out before water could flow through; is that right? A. It did; yes.

"Q. Did Mr. Grose obtain this permission in 1903? A. I am pretty sure that was the year.

"Q. You bought the place in 1898, didn't you? A. 1898.

"Q. During the period from 1898 to the time you gave this permission, in 1902 or 1903, was Mr. Grose irrigating his lands from any extension of your ditch? A. No, sir.

"Q. Are you positive of that? A. I am.

"Q. And during that same period was Mr. Grose irrigating his low lands, or what have been designated as the lands on the north of his ranch? A. I cannot remember what he was doing down there in those years, those first years.

"Q. But you do remember he was not irrigating that portion of his ranch from water obtained from your ditch? A. Yes.

"Q. Now, Mr. Matthews, is that the only permission that you gave Mr. Grose, or did he ever ask you any further permission? A. He did.

"Q. How long after the first permission? A. As I remember, every fall he would come to me—he or George Grose would come to me—and ask if I was through irrigating with that ditch, so he might have the use of it in the winter time for some purpose. \* \* \*

"Q. After this first conversation, Mr. Matthews, to which you have testified, did you ever have any further conversation with Mr. Grose regarding the taking of water through the extreme south end of your ditch? A. Only I think in the fall of the year, as the fall came around.

"Q. What is your recollection of that conversation or those conversations; what did they consist of? A. Generally as an arrangement by which he could take and use the ditch in the winter time for running a small amount of water down to his place.

"Q. How many times did such conversations occur, if you can remember? A. I think about four times.

"Q. Extending over what approximate period? A. About from 1902, I think, in the fall of 1905, including both years.

"Q. Now, Mr. Matthews, after you allowed him to take the water through that ditch pursuant to the conversations testified to by you, when did he start to irrigate with that water, if you know? A. There was one circumstance I have forgotten, that George Grose came to

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me and asked me once for permission to irrigate—I think that was in 1903—to use the ditch for about a week to irrigate some land; that was right after the ditch was cleaned and before I was ready to use the ditch. He asked me for permission to use the ditch about a week.

"Q. George Grose asked that? A. Yes; George Grose.

"Q. That would be approximately in the year 1902 or 1903? A. 1902 or 1903; I think 1903.

"Q. Did you give him that permission? A. I did.

"Q. Now, during the time that you held possession of the Gault ranch were you deprived of any water from your ditch on account of the occupants of the Grose premises using that water for stock or for other purposes? A. No, sir; I was not; I don't think so.

"Q. You didn't suffer from any of their operations in regard to the use of that water, did you? A. Some small overflows happened once in the winter time. The ditch filled with snow, and the water spread over considerable land.

"Q. I am not referring to that particularly, but I mean to say after these conversations that you had, had they taken the water and used it for stock, irrigation, or whatever purposes they may have used it for? On account of their use of that water was your supply diminished to the extent that you could not properly irrigate your lands? A. I think not, because they never used it for irrigating unless it was times when I was not using the ditch; at times when I happened to lay the ditch aside, my ground would be all wet, they would come up and turn the water down their way."

1-3. To maintain an affirmative defense it must be established by a preponderance of the evidence. An appellate court is reluctant to disturb the judgment of a trial court on the ground that the evidence does not justify the judgment, and will not do so except where there is no substantial evidence to support it. In the case at bar we think, from a reading of the entire record, that the trial court was amply justified in rendering the judgment which it did. The appellant alone testifies as to

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the granting to him of the so-called license; and the testimony of the witness Matthews, from whom appellant claims to have acquired it, who was called by respondent, shows clearly that there was no intention on his part to grant such a license. Before it can be said that such a license was granted, as contended for by appellant, there must have been a mutual understanding to that effect. Taking the testimony of Matthews at its face value, that there was no such meeting of the minds is clear.

Unless the trial judge entirely disregarded the evidence of respondent, we do not see how he could have rendered a judgment in favor of the appellant. The trial court evidently was of the opinion that the evidence in behalf of respondent was convincing. We cannot say that the court was not justified in its conclusion.

We are of the opinion that the judgment and order appealed from should be affirmed; and it is so ordered.

NORCROSS, C. J.: I concur.

MCCARRAN, J., having been counsel for one of the contending parties before becoming a member of this court, did not participate in the consideration of the case.

#### ON PETITION FOR REHEARING

*Per Curiam:*

Petition for rehearing denied.

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**REPORTS OF CASES**  
**DETERMINED IN**  
**THE SUPREME COURT**  
**OF THE**  
**STATE OF NEVADA**

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**APRIL TERM, 1916**

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[No. 2199]

ALFRED CHARTZ, D. G. KITZMEYER, MRS. C. W. FRIEND, ANDREW ROBERT, W. H. KAISER, W. H. SWEETLAND, MRS. E. KITZMEYER, GEE HING, MRS. D. G. KITZMEYER, MRS. M. E. RINCKEL, MRS. D. CIRCE, GEO. E. KITZMEYER, GEO. E. KITZMEYER (AS ADMINISTRATOR OF THE ESTATE OF MRS. L. E. KITZMEYER, DECEASED); CARSON AERIE OF EAGLES, No. 1006 (A CORPORATION), BY ITS TRUSTEES; MRS. S. J. KELSEY, J. S. SHAW, LUCY KLASS, MARIE TOUPIN, MRS. MARIE L. SUMMERFIELD, AND MRS. EMILY COFFIN-ROSS, APPELLANTS, *v.* CARSON CITY (A MUNICIPAL CORPORATION), AND A. MACDONALD, DENNIS HURLEY, PETER CROW, ROBERT L. FULSTONE, AND GEORGE GILLSON, THE DULY ELECTED, QUALIFIED, AND ACTING CITY TRUSTEES OF SAID CARSON CITY, RESPONDENTS.

[156 Pac. 925]

1. MUNICIPAL CORPORATIONS — POWERS — INDEBTEDNESS — "GREAT NECESSITY OR EMERGENCY."

Rev. Laws, 978, providing that in cases of great necessity or emergency, the governing body of a town or city may, by unanimous vote and with the approval of the state board of

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Argument for Appellants

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revenue, authorize a temporary loan to meet such necessity or emergency, does not authorize a city organized under a special charter, which as amended by Stats. 1907, cc. 29, 146, gave the trustees power to improve its streets and to issue bonds subject to the right of the voters to petition for a special election on the question, to make a temporary loan to pay for the paving of street intersections on its main street, since "great necessity or emergency" means something greatly out of the ordinary, which could not be met by the usual machinery of the government, immediately indispensable, and does not include what is merely essential in the sense of being convenient.

APPEAL from the First Judicial District Court, Ormsby County; *T. C. Hart*, Judge.

Suit by Alfred Chartz and others against Carson City and others, to restrain the issuance of notes or other evidence of indebtedness of Carson City. Judgment for the defendants, and the plaintiffs appeal. **Reversed and remanded.**

*Alfred Chartz*, for Appellants:

The act of the legislature, impliedly creating the board of revenue, has been repealed. The act of 1915 merely suspends the act of 1913, which act clearly repeals the act of 1901, which repeal carries the repeal of its amendatory act of 1903, particularly referring to section 13, impliedly creating a state board of revenue. "The repeal of an act effects the repeal of an act amendatory of the act repealed." (*Hemstreet v. Wassum*, 49 Cal. 273.) "An amendment in such terms as to stand in the stead of an original section of an act is repealed with the repeal of the act in which it stands." (26 Am. & Eng. Ency. Law, 2d ed. p. 744.)

The resolution of the board of city trustees of Carson City, asking approval of the alleged state board of revenue, fails to state facts sufficient to constitute any cause of action, or to authorize said state board of revenue to approve the same, and such failure can be taken advantage of at any time. At no time has there existed great necessity or emergency for the contemplated street paving. The existence or nonexistence of a great necessity or



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emergency is a question of fact; but a determination of the matter by a board of city trustees is not final, but is subject to review by the courts. (*San Christina Investment Co. v. C. & C. of San Francisco*, 167 Cal. 762.)

*James G. Sweeney*, for Respondents:

Such an emergency as is contemplated by the law existed. The word "emergency" is meant to imply, in the light of the law, such a condition of affairs as would warrant a board composed of reasonable beings in acting in accordance with common sense in remedying a condition which, in their judgment, called for relief.

*Geo. B. Thatcher*, Attorney-General, *amicus curiæ*:

The act of the legislature creating the board of revenue has not been repealed. An act which adopts a part or portion of another act is not repealed by the repeal of the first act. (*S. V. W. W. v. San Francisco*, 22 Cal. 434; *Lyles v. McCowen*, 82 S. C. 127; *Scheenke v. Union Depot Co.*, 4 Pac. 905; *State v. Junkin*, 123 N. W. 630; *State v. Williams*, 237 Mo. 178, 182; *Culver v. People*, 161 Ill. 89; *Ventura Co. v. Clay*, 112 Cal. 65, 73.)

"Whenever a question of fact is submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact; and if such determination comes into inquiry before the courts, it cannot be overthrown by evidence going only to show that the facts were otherwise than so found and determined." (*Pittsburg Co. v. Backus*, 154 U. S. 421, 434, 48 L. Ed. 39; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 30.)

By the Court, MCCARRAN, J.:

This action was commenced in the district court of Ormsby County by certain citizens and taxpayers of Carson City, who prayed for a restraining order and an injunction against the respondents as the duly elected, qualified, and acting city trustees, the object of the injunction being to restrain the said city trustees from issuing the notes or other evidence of indebtedness of Carson City for the purpose of paying for the paving of

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Opinion of the Court—McCarran, J.

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certain street intersections in Carson City, and also to restrain the said board of trustees from the passage of any ordinance ordering or commanding the plaintiffs, appellants herein, or any of them, to pave the section of Carson Street upon which their properties abut. It appears from the record that certain property owners and taxpayers on Carson Street in the city of Carson, thirteen in number, petitioned the city trustees to pave said Carson Street. After considering the matter, the board of city trustees passed a resolution, providing for the paving of Carson Street; and, in order to meet the expenses of the paving of the intersections of Carson Street with other streets of the town crossing the same, which space was chargeable to the city, the board of city trustees, by a unanimous vote, passed the following resolution:

“Whereas, it appearing to the board of trustees of Carson City, Nevada, that Carson Street, the main thoroughfare of said Carson City, is in a deplorable condition and in need of immediate repair; and whereas, the general fund of said city, from which is drawn the money necessary to make such repairs, is in such condition that no money can well be taken therefrom for making any repair whatever on said street; and whereas, Carson City can secure the pavement of said street from Washington Street on the north to Second Street on the south, by paving the intersections thereof, at a cost of \$10,000: Now, therefore, by reason of the great necessity or emergency existing, be it resolved that Carson City, by the unanimous vote of its board of trustees, authorize, and by this resolution does authorize, a temporary loan of \$10,000 for the purpose of paving the intersections of cross streets with said Carson Street from Washington Street on the north to Second Street on the south, all in Carson City, Nevada; that this loan be known as an ‘Emergency Loan’; that such emergency indebtedness be paid by a levy of an extra tax sufficient to pay the same at the next tax levy to be made on or about the first Monday in March, 1916;

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that such extra tax be known as an 'Emergency Tax'; that this resolution be spread upon the minutes of this board and that a certified copy thereof be sent forthwith to the State Board of Revenue asking for its approval by resolution."

This resolution was submitted to the governor, state controller, and attorney-general, styling themselves the "State Board of Revenue," and a resolution was passed by that body approving and authorizing a temporary loan of \$10,000 to be made by Carson City for the purposes set forth in the resolution of the board of trustees of said city. It is to prevent the carrying out of this resolution on the part of the board of trustees and the creating of an indebtedness against the property of the city of Carson by said board that these proceedings were instituted. Judgment having been rendered against the plaintiffs in the court below, appeal is taken from the judgment to this court and a number of assignments of error are relied upon.

The city of Carson is an incorporated city, its charter having been passed by a special act of the legislature on March 25, 1875. A number of amendatory acts have been passed by successive legislatures, many of which are unimportant to the matter at bar.

By the legislative act of February 28, 1907, section 10 of the city charter was amended, and the section as amended reads in part as follows:

"The board of trustees shall have the following powers: \* \* \* Third—To lay out, extend and change the streets and alleys in said city, and to provide for the grading, draining, cleansing, widening, lighting, or otherwise improving the same; also to provide for the construction, repair, preservation, grade, and width of sidewalks, bridges, drains and sewers, and for the prevention and removal of obstructions from the streets, alleys and sidewalks, drains and sewers of said city. \* \* \* " (Stats. Nev. 1907, p. 53.)

By the legislative act of March 28, 1907, the act incorporating the city of Carson was amended; and

sections 33 and 34 of the act as amended are in part as follows:

"SEC. 33. The board of trustees shall have the power by ordinance to grant any franchise or create any city or municipal bonded indebtedness, and to levy and collect a special tax to pay the interest and principal of such bonded indebtedness. \* \* \* But no ordinance for such purpose or purposes shall be valid or effective for any purpose unless the board of trustees shall first pass a resolution which shall set forth, fully and in detail, the purpose or purposes of the proposed bonded indebtedness, the terms, amount, the rate of interest and the time within which redeemable, and on what fund; or the applicant for, the purpose and character of, terms, \* \* \*. Such resolution shall be published in full in some newspaper published in the city, for the period of at least four weeks. On the first regular or special meeting of the board of trustees after the expiration of the period of such publication, the board of trustees shall, unless a petition shall be received by it, as in the next section provided, proceed to pass an ordinance for the issuing of the bonds, \* \* \*; *provided*, that such bonds shall be issued or municipal indebtedness created \* \* \* only on the same terms and conditions in all respects as expressed in the resolutions as published, otherwise such ordinance shall be null and void. \* \* \*" (Stats. Nev. 1907, p. 344.)

Section 34 in part provides:

"The ordinance passed on, as in the preceding section provided for, shall be valid to all intents and purposes as other ordinances duly and legally passed by the board of trustees, and any municipal bonded indebtedness created, bonds issued or franchises granted thereby, shall be in all respects valid and legal; *provided*, that if at any time within twenty days from the date of the first publication of the resolution in the preceding section, a petition signed by not less than fifty residents and taxpayers in said city, representing not less than

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one-tenth of the taxable property of said city, according to the last previous assessment roll, shall be presented to the board of trustees, praying for a special election in said city upon the question of whether or not the proposed ordinance shall be passed, then it shall be the duty of the board of trustees to call a special election as soon as practicable; such election shall be held and conducted, as nearly as possible, in the same manner as elections for city officers. Notices of such election shall be given in some newspaper published in the city, which notice shall be printed underneath the resolution hereinbefore mentioned and refer to the same, and the notice and resolution shall be published together for a period of at least two weeks before such election shall be held. The board of trustees shall in due time make provision for holding such special election and the city clerk shall prepare, at the expense of the city, suitably printed stationery for use as ballots, which shall contain the words 'For the Ordinance' (stating briefly the nature thereof), and 'Against the Ordinance' (stating briefly the nature thereof). \* \* \* " (Stats. Nev. 1907, p. 345.)

For some reason, perhaps best known to the board of city trustees, that body, in making provision for the payment of the pavement of the intersections of Carson Street, did not attempt to proceed under the provisions of the charter above set forth, but sought rather to proceed under the provisions of a general statute enacted by our legislature March 20, 1903, and which is entitled, "An act relating to the government of towns and cities, and limiting the tax rate thereof." Section 4 of the above-entitled act reads:

"SEC. 4. In case of great necessity or emergency the governing board of such town or city, by unanimous vote, by resolution reciting the character of such necessity or emergency, may authorize a temporary loan for the purpose of meeting such necessity or emergency, but such resolution shall not take effect until it has been approved by resolution adopted by the majority of the

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state board of revenue, and the resolution of the state board of revenue shall be recorded in the minutes of such city or town." (Stats. Nev. 1903, p. 216; Rev. Laws, 978.)

By section 10 of the charter of the city, as amended in 1907, the board of trustees were authorized and empowered to do that with reference to the streets and alleys of the city which might appear to them to be a necessary improvement of the same. In cases where the money from the regular annual tax was inadequate or lacking, sections 33 and 34 of the charter, as amended by the act of 1907, specified in detail the ways whereby the expense of such improvement might be defrayed. Why the board of city trustees refused to proceed under the provisions of the charter of the city of which they were trustees is not made apparent by the record. That within the provisions of the charter of the city of Carson there was a plain and adequate way provided for the accomplishment of that improvement which the trustees deemed a necessity is made apparent by a simple reading of the provisions of the charter which we quote here.

The acts of the city trustees in attempting to take advantage of a general statute pertaining to towns and cities brings before us for consideration the peculiar wording of section 4 of that act, the section under which the city trustees in this instance sought to create an indebtedness against the municipal corporation of which they were the directors.

"In case of great necessity or emergency," says the statute, "the governing board of such town or city may authorize a temporary loan for the purpose of meeting such necessity or emergency."

We do not attempt to determine as to whether or not the paving of several blocks on a main street in the city is a necessity, nor is it necessary to decide here as to whether or not we may review the determination of the board of trustees as to the necessity of paving the

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main street of the city. The city charter provides, in general terms, that the board of trustees may improve the streets of the city. The city charter specifies a working plan whereby the necessity, if it be such, may be provided for. In this respect, it requires only the initiative of the board of trustees; and if this initiative be not checked by the majority of the taxpayers, the object is effectually accomplished.

What we do assume to determine is: Was the necessity so imminent and pressing, so unusual, as to warrant the action of the city board in going round the working plan provided by their own charter and resorting to the provisions of a general statute, hence foreclosing the opportunity for popular expression contemplated by the charter on a matter of assuming the burden of unusual taxation? Was the necessity so great as to impress it with the force of a general statute enacted to relieve a financial condition growing out of some unusual circumstances? There have been many decisions rendered by the courts having before them the peculiar question of what constituted necessary improvements in matters pertaining to municipal corporations, and the question has been variously decided. But these decisions bear only remotely on the matter at bar. The constitution of the State of North Carolina provided by section 7, article 7, that:

“No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.”

The charter of the town of Washington, North Carolina, conferred general powers on the town commissioners as follows:

“They are hereby created a corporation and body politic, under the name and title of the ‘Commissioners of the Town of Washington,’ with full power to make

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by-laws not inconsistent with the constitution of the state or of the United States; to contract and be contracted with, to sue and be sued, to plead and be impleaded, by that name and title; and they are hereby invested with all other powers and rights necessary or usually appertaining to municipal corporations."

The city board sought under these powers to purchase an electric-light plant to light the streets of the town of Washington. There, as here, the contention was put forth, and the same was supported by eminent authority, that nothing was more conducive to comfort, convenience, and safety of the dwellers and general public of cities and towns than well-lighted streets, and hence the matter sought to be accomplished was a necessity and the matter of paying for the plant was a necessary expense. The Supreme Court of North Carolina, in passing upon the matter, said:

"To draw the line of demarcation between what are and what are not necessary expenses to be borne by a municipal corporation would be attended with difficulty. \* \* \* The claim of power upon the plea of necessity must stop somewhere. The restrictions contained in the constitution were not intended to be meaningless. If they had not been for a purpose, they would not have been put into the constitution." (*Mayo v. Town of Washington*, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163.)

In addition, the court in that case, after reviewing the matter from a standpoint of the working plan afforded by the constitution for the accomplishment of matters necessary, made the significant assertion:

"If the people want it, why not get it in this constitutional way?"

So we say here, the words "great necessity or emergency," as used in the general statute, are words used advisedly in that statute, to indicate something greatly out of the ordinary; something which could not be adequately met by the usual machinery of government. But if the provisions of the charter afford a plain and



adequate means whereby the very thing sought to be accomplished by this emergency loan can be accomplished, why not bring about its accomplishment through the avenue afforded in the fundamental law of the city, its charter? Judge Dillon, in the fourth edition of his work on Municipal Corporations, vol. 1, at page 145, says:

“It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation not simply convenient, but indispensable.”

It is clear to our mind that that power which the trustees of the city of Carson sought to exercise in this instance comes directly under the third subdivision as expressed by the above-quoted authority, namely, to pledge the credit of the municipal corporation for the accomplishment of a matter which, while it may be essential in the sense of being convenient, is not indispensable; at least, it is not so immediately indispensable as to require action other than that afforded by the methods provided in the charter itself. Section 4 of the general statute relating to the government of towns and cities, under which they seek to operate and pledge the credit of the municipality, was not, in our judgment, intended to be made use of in cases less than those presenting matters essential in the sense of being immediately indispensable. In our judgment it was not the legislative intent that this provision of a general statute should supersede or take the place of plain, adequate provisions of a city charter which contemplate the incurring of indebtedness or the pledging of the city's credit, when that necessity for which the indebtedness is to be incurred or the credit pledged is less than great in the sense of being imminent, urgent, indispensable. Where,

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Opinion of the Court—McCarran, J.

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perchance, the method provided by the city charter for meeting a matter of necessity would be too slow or cumbersome to bring the essential results as speedily as the exigency of the occasion demanded, then section 4 of the general statute relating to the government of towns and cities might, with propriety, be resorted to. Many conditions might arise, and we deem it unnecessary to enumerate, where, by reason of great necessity or emergency, the time within which the several steps made necessary by the charter for the creating of a bonded indebtedness would bring the results too remote, in which event the temporary loan contemplated by section 4 of the general statute relating to the government of towns and cities might be resorted to. But in the very nature of things, it is made manifest that the paving of a city street, a matter more of comfort and convenience than of immediate, indispensable emergency, does not come within the class of necessities which would demand its accomplishment before the popular will of the taxpayers of the municipality could be expressed at an election upon the bond issue.

If the charter of the city of Carson failed to specifically provide a plain and adequate way by which any municipal improvement such as the paving of a main thoroughfare could be accomplished and paid for, then, indeed, the method provided by section 4 of the general statute relating to the government of towns and cities might afford an avenue of relief. But to say, in the face of specific provisions in a charter, which specific provisions afford an opportunity for an expression of the popular will of those who are to bear the burden of the indebtedness, that the provisions of a general statute should be resorted to and the opportunity for popular expression and sanction thereby cut off, would be to nullify one of the safeguards incorporated into the charter, wherein the power was retained in the people to say whether or not a matter of unusual expense, incurring unusual tax levy, should be created.

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NORCROSS, C. J., concurring

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The action of the city board in attempting to pledge the credit of the city was, in this instance, an act in excess of authority. The necessity set forth in the resolution of the board of trustees was one which could, and should, have been met by and through the specific provisions of the charter of the city.

The injunction as prayed for in the court below should have issued.

The judgment of the lower court is reversed, and the case is remanded.

COLEMAN, J.: I concur.

NORCROSS, C. J., concurring:

I concur in the judgment and in the opinion in so far as it holds that the provisions of Rev. Laws, 978, are inapplicable as a means of providing for the payment of the cost of an improvement of the character described in the resolution adopted by the city trustees and approved by the state board of revenue, where, as in this case, the city charter prescribes an adequate method of accomplishing the same purpose. However advisable it may be to accomplish an improvement of the character in question, and however commendable may be the purpose of the city authorities in endeavoring to bring about such improvement, it is, nevertheless, one for which the charter of the city makes provisions. Section 978, Rev. Laws, which relates to the government of towns and cities, corresponds to Rev. Laws, 3831, which relates to the government of counties. The two acts were adopted at the same session of the legislature, have the same purpose, and are, in fact, companion statutes. Relative to the purpose of section 3831, which is the same as section 978, in the recent case of *Bank v. Nye County*, 38 Nev. 123, 134, 145 Pac. 932, we said:

"The act provides for a gradual reduction of the tax rate in the several counties of the state until a certain prescribed rate is reached, which should thereafter

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Argument for Appellant

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be the maximum rate. Boards of commissioners are required annually, prior to the first Monday in March, to make a budget of the amount estimated to be required to meet the expenses of conducting the public business of the county for the next ensuing year. Such boards are prohibited from allowing or contracting for any expenditure, unless the money for the payment thereof is in the treasury and especially set aside for such payment. \* \* \* Recognizing that unforeseen necessities or emergencies might arise requiring the expenditure of additional money not provided for in the general tax levy, sections 6 and 7 were inserted in the act to make provision for meeting such necessities or emergencies. These provisions are therefore in harmony with the general purposes of the act."

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[No. 2188]

STATE OF NEVADA, RESPONDENT, v. FRED  
WILSON, APPELLANT.

[156 Pac. 929]

## 1. CRIMINAL LAW—EVIDENCE—CONFESSIONS—PRELIMINARY PROOF.

A statement of defendant in police headquarters while under arrest charged with the offense is not admissible as part of the state's case in chief without a showing that the statement was voluntary, and made without hope of reward or inducement or fear of punishment.

## 2. WITNESSES — IMPEACHMENT — INCONSISTENT STATEMENTS — VOLUNTARY CONFESSION.

One accused of crime who takes the stand as a witness cannot be impeached by proof of a confession which would be inadmissible as direct evidence because made while under arrest, and not shown to have been voluntary.

APPEAL from Second Judicial District Court, Washoe County; *A. N. Salisbury*, Judge.

Fred Wilson was convicted of manslaughter, and he appeals. **Reversed and remanded.**

*Jas. T. Boyd* and *J. M. Frame*, for Appellant:

The evidence is insufficient to support the verdict, and the court erred in overruling defendant's motion for a

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Argument for Respondent

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new trial. There was no eye-witness to the tragedy. Defendant admitted the shooting and justified the act upon the ground of self-defense. There is nothing in the evidence disclosing any motive for the alleged crime. The presumption of innocence is the most favored presumption of the law, and stands in the nature of evidence in favor of the defendant. He testified in his own behalf; and, while uncorroborated by any witness, he is strongly corroborated by the facts and circumstances of the case.

The court erred in admitting testimony as to statements made by defendant after the homicide, for the reason that they were made involuntarily and under such circumstances as made their admission incompetent; and, if admissible at all, they should have been offered as part of the state's case in chief.

*Geo. B. Thatcher*, Attorney-General, and *H. C. Price*, Deputy Attorney-General, for Respondent:

Where a defendant, on trial for murder, relies for acquittal upon self-defense, it is competent to attack his credibility by proving statements made by him out of court as to the self-defense contrary to those made by him as a witness on the trial. (*People v. Rogers*, 18 L. R. A. n. s. 799; *Ammons v. State*, 18 L. R. A. n. s. 790; *State v. Cadotte*, 42 Pac. 857; *Garlitz v. Maryland*, 4 L. R. A. 601; *Smith v. State*, 137 Ala. 22; *State v. Avery*, 113 Mo. 475; *State v. West*, 95 Mo. 139; *State v. Broadbent*, 71 Pac. 1; *Cravens v. Bennett*, 30 Pac. 61; *McGuire v. State*, 57 South. 57; *Commonwealth v. Tolliver*, 119 Mass. 312; *People v. Walker*, 140 Cal. 153; *State v. Cary*, 159 Ind. 504; *State v. Kennade*, 121 Mo. 405.)

"When accused has testified in his own behalf, it is not error to allow the prosecution to prove, in contradiction of his testimony, declarations made by himself, although such as might have been offered as a part of the case in chief." (*Leighton v. People*, 10 Abb. N. C. 261, 88 N. Y. 117.) It is not error to allow a witness to refresh his memory by referring to and reading a written statement made by himself. (*Pinschower v. Hanks*, 18 Nev. 99.)

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Opinion of the Court—McCarran, J.

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By the Court, MCCARRAN, J.:

This is an appeal from a judgment following a verdict of conviction for manslaughter and from an order denying a motion for a new trial.

There are many assignments of error, most of which deal with the several instructions given by the trial court, but, in view of the fact that this case must be reversed by reason of the ruling of the trial court in admitting certain evidence hereafter set forth, we deem it unnecessary to dwell at length on other assignments.

During the course of the trial the defendant took the stand as a witness in his own behalf; and on cross-examination, over the timely objection of his counsel, certain interrogatories were propounded to him by the prosecuting attorney relative to a statement purported to have been made by the defendant shortly after the homicide, in the police headquarters, after he was placed under arrest. The record sets forth the following:

"Q. (by the prosecuting attorney.) Mr. Wilson, have you ever made any other statement relative to this occurrence, aside from the one which you have made down here on the witness stand? A. Well, I have told something about it.

"Q. To whom have you told it? A. I told the captain of police something about it.

"Q. Capt. Trembly? A. Yes, sir.

"Q. Did you tell any one else about it? A. I told you, I think, a little something about it.

"Q. Yes. A. Right after it happened.

"Q. About what time of the day was it that you told— A. Well, it was right after the occurrence; I don't know how long after; possibly 1:30.

"Q. In that statement which you made to me was any one else present? A. Yes, sir.

"Q. Was the statement freely made? A. What?

"Q. You made the statement voluntarily, did you not? A. Well, no; not altogether; I was asked questions.

"Q. Was any one else present at the time that statement was made? A. Yes, sir; there were three or four. \* \* \*

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Opinion of the Court—McCarran, J.

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"Q. Calling your attention to the following, I want you to listen to it and state whether or not you made this statement."

At this juncture, as the record discloses, the prosecuting attorney read from a paper a series of questions and answers purporting to be interrogatories propounded to and answers made by the defendant in the presence of the prosecuting attorney, the captain of police, Miss Callahan, a shorthand reporter, and others, in the police headquarters while he was under arrest charged with the killing of deceased. At the conclusion of these interrogatories the prosecuting attorney propounded the question:

"Q. Did you make such a statement, or did you not? A. I don't remember these statements.

"Q. Did you make them or did you not? A. Well, those statements, I don't remember them as they come, and I was very much excited.

"Q. Answer my question. A. And if I made those statements, why it was through excitedness."

Following this the record discloses that, over the objection of defendant's counsel, the witness Miss M. I. Callahan was permitted to testify:

"Q. What is your occupation, Miss Callahan? A. Stenographer in the district attorney's office.

"Q. Were you such stenographer on the 14th day of October of this year? A. I was.

"Q. I will ask you to state whether on that date you saw the defendant, Wilson. A. Yes, sir; I did.

"Q. Where did you see him? A. At the chief of police's office.

"Q. In what room? A. In an inner room in the police department.

"Q. Who was present at that time? A. Capt. Trembly, Mr. Nichols, and the district attorney, myself, and the defendant.

"Q. The district attorney? You mean me? A. Mr. M. B. Moore.

"Q. At that time I will ask you to state what was the appearance of the defendant? Did he appear to be

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excited, or otherwise? A. Why, he was very calm. I particularly noticed that he was. I made that observation to myself, that he was very calm for a person who was in danger of being charged with such a crime.

"Q. Did he make any statement in your presence and the presence of the others which you have named as to the trouble between him and the Japanese Wada? A. Yes, sir; he did.

"Q. Did you take that statement down at that time? A. Yes, sir.

"Q. And did you afterwards extend it? A. Yes, sir.

"Q. I will ask you to state, Miss Callahan, whether or not you recognize that (showing). A. Yes, sir; I recognize this transcription.

"Q. Is this, Miss Callahan, the transcription of the notes which you took at that time? A. Yes, sir.

"Q. I will ask you to state, Miss Callahan, if at the police station in the city of Reno, in the presence of myself, yourself, Capt. Trembly, and Mr. Nichols, you heard the defendant, in response to a question, the following question which I asked him, give the following answer: 'Q. What is your name? A. Fred Wilson.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same persons, in response to the following question: 'Q. How long have you been here?'—did you hear him make the following answer: 'A. Why, since last February, I believe.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same people, in response to the following question propounded by me: 'Q. Been working at the Clarendon ever since?'—did he make the following answer: 'A. No; been working at the Clarendon since the 6th of March.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same people, the same persons, in response to the following question: 'Q. Night clerk or day clerk?'—did you hear him make the following answer: 'A. Both.' A. Yes, sir.

"Q. At the same time and place, and in the presence



of the same persons, and in response to the following question propounded by me: 'Q. What caused this trouble down there, the shooting of this Jap?'—did you hear him make the following answer: 'A. Well, today— It started last night over a couple of hot rolls. He charged me 15 cents for them and I told him that it was too much, and we got into a little quarrel about it, and he told me to get out or he would kill me. I told him I would get out, but I said, "Don't you come in that back room, because that is my room, the toilet; so I locked the door." This morning he comes in and tries this door, and it was locked. He told me to open it, and I told him that I wouldn't. He went upstairs and had a talk with Mrs. Clark, and she sent for me. I went up and she asked me to open it, and I started down again, and in the meantime I had my club under the desk; I expected to have to use one; and he started to urinate on the floor.' Did he make that answer? A. Yes, sir.

"Q. At the same time and place, in the presence of the same people, in response to the following question: 'Whereabouts?'—did he make the following answer: 'Right next to the toilet, and I told him not to do it. And I looked around for my club, and it weren't there, and I thought I would take a chance with my bare fists, and he comes at me with my own club, and I dodged it and jumped back and pulled my gun and shot him.' A. Yes, sir.

"Q. At the same time and place, and in the presence of the same persons, in response to the following question: 'Q. Did he say that he would kill you?'—did he make the following answer: 'A. He told me that if I ever came in there any more he would kill me.' A. Yes, sir.

"Q. At the same time and place, and in the presence of the same persons, in response to the following question propounded by me: 'What conversation was had between you and him the morning of the shooting?'—did he make the following answer: 'There was hardly any conversation at all; only told me that he was going to

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Opinion of the Court—McCarran, J.

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kill me, and attempted it right there with the big club. He struck at me with the club.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same people, in response to the following question propounded by me: 'What sort of a club was it?'—did he make the following answer: 'About twenty inches long with a string tied on the end of it. He went to strike and fell, and as he fell he threw the club in front of him.' A. Yes, sir.

"Q. At the same time and place, and in the presence of the same persons, in response to the following question propounded by me: 'Had you seen him this morning before the time that the shooting occurred?'—did he make the following answer: 'No, sir.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same persons, in response to the following query propounded by me: 'Is that the club?'—did he make the following answer: 'Yes, sir.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same persons, in response to the following question propounded by me: 'That is your club?'—did he make the following answer: 'Yes, sir; that is it. It belongs to the hotel. I kept it under the desk.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same persons, in response to the following question propounded by me: 'When was the last time that you saw it there?'—did he make the following answer: 'I put it under the desk this morning.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same persons, in response to the following question propounded by me: 'How do you think that it came to be there?'—did he make the following answer: 'Just as he passed along through the office, when Mrs. Clark called me, I suppose he saw it; I suppose that he could see it.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same persons, in response to the following question propounded by me: 'Did he strike at you more than once?'—

did he make the following answer: 'I didn't give him time, as he struck at me he fell.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same persons, in response to the following question propounded by me: 'What sort of a gun was this?'—did he make the following answer: 'A 32 automatic Colt's.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same persons, in response to the following question propounded by me: 'Automatic?'—did he make the following answer: 'Yes, sir.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same persons, in response to the following question propounded by me: 'How long has the Jap been running this restaurant?'—did he make the following answer: 'I couldn't say; he has been there ever since I have been here.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same persons, in response to the following question propounded by me: 'Have any trouble with him before?'—did he make the following answer: 'No, sir; I never did.' A. Yes, sir.

"Q. At the same time and place, in the presence of the same persons, in response to the following question propounded by me: 'Who made that club?'—did he make the following answer: 'I don't know; it was in the house before I came.' A. Yes, sir."

The statement is made in respondent's brief that this testimony in the first place was not sought to be introduced as a part of the state's case as a confession or statement of this defendant. If it had been, they say it would have been necessary to show that it was made freely, voluntarily, without any threat, not through fear or promise of reward. They justify the acts of the trial court in admitting this testimony in the following statement:

"The defendant came on the witness stand a voluntary witness, and when he did so he became subject to all of

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the rules that any witness is subject to, and is liable to impeachment the same as any other witness."

Respondent further seeks to justify the ruling of the trial court in admitting this testimony, by the statement that it was not direct testimony, and was sought to be propounded to the defendant as impeaching questions only to show that at another time, before other people, at an earlier date, he made a different statement.

1. It requires no citation of authority, as we view it, to support the assertion that, before the statement or series of answers made by the defendant in the police headquarters while he was under arrest charged with the offense could have been admitted as a part of the state's case in chief, it would have been necessary to lay a foundation for its admissibility, showing that the statement was voluntary, and that the same was made without hope of reward, inducement, or fear of punishment. (*State v. Dye*, 36 Nev. 143, 133 Pac. 935, and cases there cited.)

2. It is not contended by the respondent that any such foundation was laid, nor was it contended by the prosecuting attorney in the court below that the statements made by the defendant in the police headquarters were admissible as a part of the state's case in chief. We are asked to affirm the action of the trial court in admitting this testimony, solely upon the ground that the testimony was elicited by way of contradictory statements for the purpose of impeaching the defendant as a witness.

First, let us ask the question: Was the evidence competent in the first instance? Could it have been introduced against the defendant as a part of the state's case in chief? Manifestly not; for it lacked all the elements which go to make up a competent statement under such circumstances. Was it matter brought out in the direct examination and on which the defendant could be properly cross-examined? No. The contention of respondent that the defendant, having submitted himself as a witness in his own behalf, thereby subjected himself to cross-examination and impeachment to the

same extent as any other witness, is, in our judgment, answered by the familiar rules that a witness can be impeached only as to matters within the legitimate scope of cross-examination, and that no witness may be impeached by incompetent evidence. This being true, the whole matter turns on the question of whether or not the evidence elicited from the witness, Miss Callahan, was or was not competent. The answer is that it was not. Here was an introduction of testimony by the indication of cross-examination which by reason of its lack of competency could not have been introduced as a part of the state's case. This entire question is extensively discussed in the case of *Harrold v. Territory of Oklahoma*, 169 Fed. 47, 94 C. C. A. 415, 17 Ann. Cas. 868. The court said:

"And right here is the limitation of the waiver by an accused person of his constitutional privilege under the second rule by testifying, and here is the evidence of the violation of that rule in this case. He may not 'be compelled in any criminal case to be a witness against himself.' When he testifies as a witness, he waives this privilege of silence and subjects himself to cross-examination and impeachment to the same extent as any other witness would subject himself thereto in the same situation, but no farther. He may be cross-examined upon the subjects of his direct examination, but not upon other subjects; impeaching questions relative to facts not collateral to the issue—that is to say, relative to facts which the prosecutor is entitled to prove as a part of his case—may be lawfully propounded to him (Wharton's Criminal Evidence, 9th ed. sec. 484), but such questions relative to facts that may not be so proved may not be asked him; and he may be impeached by competent proof of statements made by him contradictory to his answers to such lawful questions, but not by proof of answers contradicting unlawful questions. For these are the limits of the cross-examination and of the lawful evidence of impeachment of other witnesses."

Concluding the subject, the court said:

"The impeaching questions asked the defendant, and

## Opinion of the Court—McCarran, J.

the involuntary confession introduced to contradict his answers, were beyond the limits of legal cross-examination of him, or of any other witness in his situation, because they did not relate to the subjects of his direct examination, and because they were not germane to any fact which the prosecutor was entitled to prove as a part of his case. Hence the defendant did not waive his constitutional and statutory right to refuse to testify concerning the statements in his confession, and the propounding of the questions concerning them, and the introduction of the involuntary confession, were violations of that right."

A case quite analogous to the one at bar is that of *Brown v. State*, 55 Tex. Cr. R. 572, 118 S. W. 139. In that case the court said:

"Even before the last act of the legislature this court had held that confessions of a party under arrest made without warning could not be used against him, even for the purpose of impeachment, citing *Morales v. State*, 36 Tex. Cr. R. 234, 36 S. W. 435, 846; *Wright v. State*, 36 Tex. Cr. R. 427, 37 S. W. 732; *Bailey v. State*, 40 Tex. Cr. R. 150, 49 S. W. 102; *Rodriguez v. State*, 36 S. W. 439; *Walton v. State*, 41 Tex. Cr. R. 454, 55 S. W. 567; *Parker v. State*, 57 S. W. 668; *Johnson v. State*, 43 Tex. Cr. R. 476, 66 S. W. 846."

The case of *Shephard et al. v. State*, 88 Wis, 185, 59 N. W. 449, is interesting as bearing upon the subject. In that case the trial court had excluded a confession as being incompetent. The defendant, having taken the stand, was asked if he made that confession and denied it. The same witness who extorted the confession and whose testimony was in the first instance disallowed on that ground was allowed to testify to the confession, on the theory that it was not admitted as confession, but merely to contradict the defendant. The Supreme Court of Wisconsin, in commenting upon this phase of the case, said:

"The method here adopted to get the confession of Joseph Shephard in evidence, after it had been excluded by the court as being incompetent and inadmissible by

reason of its having been extorted by promises of immunity and threats of injury and by falsehood, was certainly very ingenious and plausible."

"The confession is just as objectionable as evidence, and as incompetent and hurtful, when offered in one way as in another. If no other evidence on the ground of contradicting the defendant as a witness could be found, he had better have gone uncontradicted than that his legal rights as a prisoner should be so violated, and his conviction obtained by such unlawful testimony. The object is to get the confession in evidence. It cannot be done directly, but it can be done indirectly. It cannot be used to convict, but it can be used to contradict, the defendant, and in that way it is used to convict him all the same. We cannot adopt such a principle or practice in the administration of criminal law. It is unreasonable as well as unjust."

In the case of *People v. Yeaton*, 75 Cal. 415, 17 Pac. 544, the matter at bar is emphatically dealt with. In that case the rule is supported that the defendant in a criminal prosecution, who is a witness in his own behalf, cannot be compelled on cross-examination to testify to statements made by him out of court which amount to a confession of the crime, unless it be first shown that the confession was voluntary; and the fact that the evidence was offered by the prosecution, not as a confession, but merely as a contradictory statement, for the purpose of impeaching the defendant who became a witness in his own behalf, makes this rule none the less enforceable and just.

The error complained of in this respect was one which directly affected the rights of the defendant. For this reason, the case must be reversed and remanded for a new trial.

It is so ordered.

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Points decided

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[No. 2134]

**SARAH BELLE SKAGGS, ADMINISTRATRIX OF THE  
ESTATE OF THOMAS BRYANT, DECEASED, APPELLANT,  
v. W. E. BRIDGMAN AND GERTRUDE BRIDG-  
MAN, RESPONDENTS.**

[154 Pac. 77; 159 Pac. 521]

**1. APPEAL AND ERROR—MOTION TO DISMISS—TIME FOR FILING.**

That a motion to dismiss an appeal for noncompliance with supreme court rules 2 and 3, providing that the transcript of the record must be filed within thirty days after the appeal has been perfected and the statement settled, otherwise the appeal will be dismissed on motion without notice, was not filed until more than three terms had elapsed after the appeal was taken and the record filed in the supreme court, did not amount to a waiver of the right to make a motion; supreme court rule 8, providing that objections to the record affecting any right "which might be cured on suggestion of diminution of the record," not applying.

**ON MOTION TO RESTORE APPEAL****1. APPEAL AND ERROR—STATEMENT—NEW STATEMENT—JURISDICTION.**

The supreme court has no power to make a new statement on appeal, which must be settled in the lower court, or to direct that court to make one, the statement having been settled as prescribed by statute; but any relief under the practice act, sec. 142 (Rev. Laws, 5084), by reason of mistake, inadvertence, surprise, or excusable neglect of appellant, must be had in the lower court; a motion for a new trial there made having never been determined.

**2. APPEAL AND ERROR—DISMISSAL—RESTORATION.**

An appeal dismissed for noncompliance with supreme court rules 2 and 3 will not be restored, where no purpose would be served, the record presenting for consideration only the judgment roll showing no error.

**APPEAL** from the Fourth Judicial District Court, Elko County; *Edward A. Ducker*, Judge.

Action by Sarah Belle Skaggs, administratrix of the estate of Thomas Bryant, deceased, against W. E. Bridgman and another. From judgment for defendants, plaintiff appeals, and defendants move to dismiss the appeal. **Motion granted.**

*W. W. Griffin*, for Appellant.

*Carey Van Fleet* and *Chas. R. Lewers*, for Respondents.



By the Court, NORCROSS, C. J. :

This is a motion to dismiss the appeal for noncompliance with the provisions of rules 2 and 3 of the supreme court. Notice of appeal in this cause was filed in the court below on the 7th day of July, 1913. On the 12th day of August, 1913, the clerk of the court below attached his certificate to the record on appeal. The record was filed in this court on the 22d day of July, 1914. On the 27th day of February, 1915, the court, upon application therefor, made an order for substitution of attorneys for appellant. Thereafter, and on the 20th day of September, 1915, counsel for appellant filed a brief upon the merits. Thereafter, and on the 5th day of October, 1915, counsel for respondent Garrecht filed and served a written notice of motion to dismiss the appeal. At the time of filing the motion to dismiss, a certificate of the clerk of the court below, as required by subdivision 2 of rule 3, was also filed. The motion to dismiss was heard on the 4th day of November, 1915. The only objection to the motion to dismiss upon the part of counsel for appellant is based upon the provisions of rule 8, and the case of *Kirman v. Johnson*, 30 Nev. 146, 93 Pac. 500, 96 Pac. 1057, is relied upon to sustain their contention that the motion to dismiss comes too late. Rules 2, 3, and 8 provide:

Rule 2. "The transcript of the record on appeal shall be filed within thirty (30) days after the appeal has been perfected and the statement settled, if there be one."

Rule 3. "1. If the transcript of the record be not filed within the time prescribed by rule 2, the appeal may be dismissed on motion without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and, unless so restored, the dismissal shall be final and a bar to any other appeal from the same order or judgment."

Rule 8. "Exceptions or objections to the transcript, statement, \* \* \* or any other technical exception or objection to the record affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record,

## Opinion of the Court—Norcross, C. J.

must be taken at the first term after the transcript is filed,  
\* \* \* or they will not be regarded."

We are unable to see how the provisions of rule 8 could have any possible bearing upon the motion here in question. No objection is made to the transcript or record upon appeal "which might be cured on suggestion of diminution of the record." The motion to dismiss deals solely with the question of the applicability of rules 2 and 3 to the fact that more than three terms elapsed after the appeal was taken and the record certified to before the same was filed in this court. Prior to the amendments of rules 2 and 3 by amendment of October 25, 1911, it was provided in rule 3:

"If the transcript of the record be not filed within the time prescribed by rule 2, the appeal may be dismissed upon motion during the first week of the term without notice."

In *Robinson v. Kind*, 25 Nev. 273, 59 Pac. 863, 62 Pac. 705, this court considered, but did not decide, whether a failure to make a motion to dismiss "during the first week of the term" would amount to a waiver of the right to make such motion. The rule as it now reads places no limitation upon the time within which a motion to dismiss for failure to comply with the provisions of rule 2 may be made. We see no reason for holding, and none has been urged, that the motion to dismiss is not in time. Where there has been a failure to comply with the provisions of rule 2, a motion to dismiss, supported by proper certificate of the clerk, would ordinarily be granted as a matter of course. We need not now consider whether, upon a consideration of a motion to dismiss, notice of which has been given, the appellant making a showing that would warrant a restoration of a dismissed appeal, the order for that reason should be denied, as no such showing has been made.

The motion to dismiss the appeal should be granted, subject to the right of appellant, upon good cause shown (*Lighle v. Ivancovich*, 10 Nev. 41, 43), to move to restore

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Opinion of the Court—NORCROSS, C. J.

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the appeal under the provisions of rule 3 during the next succeeding term.

It is so ordered.

ON MOTION TO RESTORE APPEAL

By the Court, NORCROSS, C. J. :

1, 2. This court heretofore dismissed the appeal in the above-entitled cause for noncompliance with the provisions of rules 2 and 3 of this court, subject to a motion to reinstate as prescribed in said rule 3. A motion to restore the appeal has been made. In *Lightle v. Ivanovich*, 10 Nev. 41, 43, this court said:

"As this is the first case where an interpretation has been given to these rules, we deem it proper briefly to state that we entertain the opinion that all applications to reinstate appeals must show that appellant has used reasonable diligence in procuring, or attempting to procure, the transcript on appeal, and if he fails to present the same in this court within the time prescribed by rule 2, his affidavit must present sufficient facts to constitute a legal excuse for the delay, and, in addition to the statement 'that the appeal has been taken in good faith,' it should also show that in the opinion of appellant's counsel 'there are substantial errors in the record which ought to be corrected by this court.' (*Hagar v. Mead*, 25 Cal. 600; *Dorland v. McGlynn*, 45 Cal. 18.)"

The appeal in this case is from the judgment alone, and it is conceded that the record certified from the court below as the record on appeal would present only the judgment roll for consideration, and that no error appears upon the face of the judgment roll.

Counsel for appellant has, however, filed with the clerk of this court what is alleged to be the transcript of the testimony in the case, together with certain exhibits, and we are asked virtually, either to make a new record on appeal ourselves, or to direct the court below to do so. This request is based upon the provisions of section 142 of the practice act (Rev. Laws, 5084) authorizing the

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Opinion of the Court—Norcross, C. J.

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relief of a party from some proceeding taken against him "through his mistake, inadvertence, surprise, or excusable neglect." The record certified to this court was made by former counsel for appellant. It appears that appellant has been represented in the court below and in this court at various times by different attorneys and firms of attorneys.

The affidavit of appellant and the affidavit of one of her former counsel set forth alleged facts justifying, according to the contention of counsel now appearing for appellant, some relief to appellant whereby her case could be heard upon its merits in this court. The case upon an appeal from the judgment alone could only be heard and determined in this court upon a statement on appeal or a bill of exceptions. Whichever method is pursued, the statement or bill must be settled in the court below. A statement was settled in the way prescribed by the statute, and we now have no power to make a new statement or to direct the court below to make a new and different one.

It appears from the affidavits filed that a motion for a new trial was made in the court below, which motion has never been submitted to the court below, and hence has never been determined. If the plaintiff in the action is entitled to any relief by reason of mistake, inadvertence, surprise, or excusable neglect, we think the only forum to appeal for such relief is in the court below.

As no purpose could be served by restoring the appeal, the motion should be, and is, denied.

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Points decided

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[No. 2187]

**F. E. SEELEY, PLAINTIFF-APPELLANT, v. JAMES GOODWIN, A. L. WAGNER, J. W. FERGUSON, J. E. KENDALL, AND E. J. LUPIN, DEFENDANTS. E. J. LUPIN, RESPONDENT.**

[156 Pac. 934]

**1. MORTGAGES—FORECLOSURE—APPEAL—NECESSARY PARTIES.**

In suit to foreclose a mortgage, a subsequent purchaser whose right was defeated by execution sale, and the execution purchaser and his grantee, who had deeded the land to one defendant, were not necessary parties to an appeal, which would not be dismissed on that ground.

**2. APPEAL AND ERROR—SCOPE OF REVIEW—MATTERS NOT AT ISSUE.**

The court on appeal will assume a ruling of the trial court not questioned by counsel for the adverse party to have been correct.

**3. MORTGAGES — VALIDITY — CAPACITY OF PARTIES — WHO MAY ATTACK—DEGREE OF PROOF.**

Assuming that a subsequent purchaser of the mortgagor may assert the mortgagor's incapacity owing to intoxication at the time of drawing the mortgage, the degree of proof required to show such incapacity on his part is at least equal to that required from one asserting his own incapacity.

**4. MORTGAGES—EXECUTION—CAPACITY OF PARTIES—INTOXICATION—EVIDENCE.**

The mere fact that signatures to a note and mortgage were poorly made is insufficient to show that the maker was intoxicated.

**5. ACKNOWLEDGMENT—EVIDENCE—NOTARY'S CERTIFICATE.**

In the absence of direct evidence on the question of mental capacity of the mortgagor owing to intoxication at the time of drawing the mortgage, the fact that the certificate of a notary public showed that the mortgage was acknowledged before him and that he executed it is *prima facie* evidence of due execution.

**6. MORTGAGES—EXECUTION—CAPACITY OF PARTIES—EVIDENCE.**

Evidence *held* insufficient to show that a mortgagor was mentally incapacitated by intoxication at the time of drawing a mortgage.

**APPEAL** from Sixth Judicial District Court, Humboldt County; *Edward A. Ducker*, Judge.

Action by F. E. Seeley against James Goodwin and others. From a judgment in favor of defendant E. J. Lupin and order denying new trial, plaintiff appeals. **Reversed.**

## Argument for Respondents

*J. M. Frame and R. Gilray, for Appellant:*

The lien acquired by writ of attachment affected only whatever title was at the time in Goodwin, and the same did not attach to any interest that had theretofore been acquired by the plaintiff by virtue of the mortgage, even though unrecorded, and at most would have affected only the equity of redemption existing in Goodwin. An attaching creditor, claiming title through an attachment sale, is not in the position of an innocent purchaser, but takes only such an interest as the attached debtor had at the time in the property; and this being only the equity of redemption, he can acquire no title adverse to or superior to a mortgage. (*Virgin v. Brubaker*, 4 Nev. 32; *Vaughn v. Schmalsle*, 25 Pac. 102; *Dawson v. McCarty*, 57 Pac. 816.)

The defense of incompetency through intoxication is in the nature of a personal right, which may be asserted only by the party himself, and is not a right which passes with the conveyance of real estate and runs with the land. Third parties, although privies in estate, cannot assert such a defense. (14 Cyc. 1104.) Such contracts are in their nature voidable and not void. (*Joest v. Williams*, 42 Ind. 565; 6 R. C. L. 595-599; *Carpenter v. Rodgers*, 61 Mich. 384, 1 Am. St. Rep. 595.)

It was not necessary to serve notice of appeal upon all the parties named in the record as defendants. The action is to foreclose a mortgage, and it was necessary to serve notice of appeal only upon the party who had an interest adverse to appellant. The other defendants named in the record are neither necessary nor proper parties to the action. (*Hinson v. Gammon*, Am. Ann. Cas. 1913A, 83; *Nelson Bennet Co. v. Twin Falls L. & W. Co.*, 13 Am. Ann. Cas. 172.)

The motion to dismiss the appeal should not be granted, the point involved having been already decided adversely to respondent by this court. (*Douglass v. Thompson*, 35 Nev. 196, Am. Ann. Cas. 1914C, 920; *Bliss v. Grayson*, 24 Nev. 422, 56 Pac. 231, 25 Nev. 329, 59 Pac. 888.)

*C. E. Robins and J. A. Callahan, for Respondents:*

The appeal should be dismissed for want of jurisdiction.

## Opinion of the Court—NORCROSS, C. J.

Failure to serve notice of appeal on an adverse party is a jurisdictional defect that deprives the supreme court of the jurisdiction to hear the appeal. (Rev. Laws, 5322, 5323, 5330, 5331; *Pacific Mutual Life I. Co. v. Fisher*, 39 Pac. 758.)

If the position of a party on the record makes him adverse, he must be so considered for the purpose of appeal from the judgment thereon. (*Harriman v. Menzies*, 44 Pac. 660; *Vincent v. Collins*, 55 Pac. 129.)

Every party whose interest in the subject-matter of the appeal is adverse to or will be affected by a reversal of modification of the judgment or order appealed from, is an adverse party. (*Crouch v. Railroad*, 117 N. W. 145; *Lydon v. Godard*, 51 Pac. 459; *Lewiston National Bank v. Tefft*, 53 Pac. 271; *Titiman v. Alamance M. Co.*, 74 Pac. 529; *Bridgham v. National Pole Co.*, 147 Pac. 1056; *Davis v. Mercantile Trust Co.*, 38 L. Ed. 563.)

The note and mortgage are void, because of the intoxication of the mortgagor at the time of their execution. (*Cameron Barkley Co. v. Thornton L. & P. Co.*, 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532; *Hunter v. Tolbard*, 47 W. Va. 258, 38 S. E. 737; *Green v. Gunsten*, 142 N. W. 261; *Cavender v. Waddington*, 5 Mo. App. 457.)

If there is any evidence to support the finding of the lower court, it will not be disturbed on appeal. (*State v. Carson and Colorado Ry. Co.*, 29 Nev. 487.)

By the Court, NORCROSS, C. J.:

This is a suit in foreclosure of a mortgage upon certain real property in the town of Winnemucca. From a judgment in favor of the defendant E. J. Lupin, the plaintiff has appealed.

From the pleadings and evidence in the case it appears that on the 16th day of March, 1909, at San Francisco, State of California, one James Goodwin, named as a defendant in the complaint, gave his promissory note to one Louis Goldstone, a resident of said city and state, for the sum of \$175, payable with interest sixty days after date. At the same place and date the said Goodwin gave to said Goldstone a mortgage upon certain lots

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belonging to Goodwin in the town of Winnemucca as security for the payment of said note. The note and mortgage were signed by Goodwin, and the execution of the mortgage was acknowledged as of even date before a notary public in and for the city and county of San Francisco. The mortgage was duly recorded at the request of said Goldstone by the county recorder of Humboldt County in the records of said county on the 24th day of March, 1909. It is alleged in the complaint and shown by the evidence that on the 4th day of March, 1910, the said Louis Goldstone, for a valuable consideration, assigned and transferred the said note and mortgage to the plaintiff and appellant, F. E. Seeley.

It appears from the pleadings and evidence that on the 19th day of March, 1909, three days subsequent to the execution of the mortgage, and five days before the recording thereof, the defendant J. W. Ferguson instituted a suit in the justice's court in the town of Winnemucca against the said James Goodwin, and attached the property of the defendant Goodwin described in the mortgage. Having recovered judgment in the attachment suit, the property attached was sold by the constable in satisfaction of the judgment, purchased by the said Ferguson at the constable's sale, and a constable's deed granted to said Ferguson on the 26th day of November, 1909. On the 27th day of May, 1909, the said Goodwin deeded the property to the defendant A. L. Wagner. On the 10th day of February, 1911, the said J. W. Ferguson deeded the property to the defendant J. E. Kendall. On the 25th day March, 1912, the defendant Kendall deeded the property to the respondent Lupin.

In addition to denying, on information and belief, the making or execution of the note or mortgage by Goodwin, the answer of defendant Lupin set up the following affirmative defenses:

(a) That the note and mortgage were void because made, executed, and delivered at a time when the said Goodwin was entirely irresponsible and incapable of



entering into a valid contract by reason of drunkenness.

(b) That, the property having been attached prior to the recording of the mortgage and subsequently sold by the constable in the attachment suit, the rights of the plaintiff were subordinate to the rights of the defendant Lupin.

The case was tried to the court with the aid of a jury, to which were referred two questions, which, together with the answers returned, read as follows:

“Question No. 1: At the time the note and mortgage here in question were given by James Goodwin to Louis Goldstone was James Goodwin so intoxicated as to deprive him of his reason and understanding to the extent that he did not know the effect of those instruments or the nature of the transaction? Answer: Yes.

“Question No. 2: On March 19, 1909, at the time Ferguson’s attachment was levied on the lots described in the complaint, had Ferguson any knowledge that the note and mortgage in question were in existence? Answer: No.”

1. Preliminary to a consideration of the questions presented upon the merits of the appeal a motion to dismiss the appeal should be disposed of. The defendants Wagner, Ferguson, and Kendall were not made parties to the appeal by service upon them of the notice of appeal. It is contended by counsel for respondent that they are necessary parties to the appeal. We think this contention is without merit. The defendants Wagner and Ferguson failed to answer, and their default was duly entered. The judgment shows that, as against the defendant Goodwin and his administrator (Goodwin having died subsequent to the institution of the suit and prior to the trial), an order of dismissal from the case was entered without objection prior to the trial. Wagner’s rights under his deed from Goodwin were cut off by the constable’s sale and deed to Ferguson. Whatever rights Ferguson and Kendall obtained were transferred by their deeds and acquired by the respondent Lupin. The judgment was in favor of Lupin alone for

## Opinion of the Court—Norcross, C. J.

the property and for the costs of suit. We are unable to see how any reversal of the judgment could, under the pleadings and evidence, affect any of the rights of the codefendants as between each other. The only liability of Ferguson to Kendall or of Kendall to Lupin was upon their "grant, bargain, and sell" deeds. It is not contended that the only liability which the statute imposes by reason of such deeds (Rev. Laws, 1063) could be of any avail to respondent in this case in the event of a reversal.

Even if it may be said that the several defendants obtained a judgment against the plaintiff to the effect that the note and mortgage were void from their inception, none of these other defendants can assert any rights by virtue of that judgment against the respondent Lupin. So far as the plaintiff in the action is concerned, these other defendants were never necessary parties to the suit. (*Nelson Co. v. Twin Falls Co.*, 13 Idaho, 767, 92 Pac. 980, 13 Ann. Cas. 172; *Bliss v.*

The court below adopted the finding of the jury as *Grayson*, 25 Nev. 329, 59 Pac. 888.)

shown by the answer to question No. 1, *supra*, and based its decision and judgment thereon.

2. Relative to the second special issue submitted to the jury, the court held that the defendant could acquire no rights in the property superior to the mortgage by reason of the fact that the attachment was levied upon the mortgaged premises prior to recording of the mortgage, but subsequent to its execution. As the correctness of the ruling of the trial court upon this latter point has not been questioned by counsel for respondent, we will assume it to have been correctly decided. Counsel for appellant in support of the court's ruling have cited *Virgin v. Brubaker*, 4 Nev. 32; *Vaughn v. Schmalsle*, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411; *Dawson v. McCarty*, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841; Rev. Laws, 1038-1040. See, also, 2 R. C. L. p. 860, sec. 72.

3. As to the question of Goodwin's mental condition

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at the time he executed the note and mortgage in San Francisco, there was no testimony of any witness who saw him or observed his physical or mental condition at that time. We quote the following from respondent's brief, and assume that it states the evidence, which, by the way, we have read in full, as strongly in support of respondent's contention as the evidence warrants:

"Four or five days after that time [March 16, 1909] Goodwin returned to Winnemucca, Nevada. His physical and mental condition at that time would make any one know that he had been drunk quite awhile; he was emaciated and in such a condition that one would know he had been on a big drunk and had not got back all of his mental faculties; he had been on a drunk not less than ten or twelve days, and had the appearance of having been on a protracted spree prior to that time.

"Witness Ferguson, who had known Goodwin and was well acquainted with him for a number of years, testified that after Goodwin had been drinking for two or three days that the faculties of his mind would be destroyed, and that when he drank he would get very nervous at first, could not be kept in bed, would just run around, stay awake, and be nervous and excitable, and as he kept on drinking he would get so that he could not take care of himself at all, and become filthy in his habits, etc., and incompetent to take care of himself in any manner mentally or physically, could not remember anything at all, and most of his thoughts were a blank to him, and that all he wanted was whisky, and would drink as much as he could get.

"Witness S. G. Lamb, sheriff of Humboldt County, was well acquainted with Goodwin, and proved that when Goodwin drank he was helpless as far as knowing anything, and he was not fit to be at large."

It is not contended, as we understand, that when Goodwin returned to Winnemucca, about the 21st of March, that he was then in an intoxicated condition, or at least was not sufficiently responsible to enter into ordinary business transactions. The witness Ferguson

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details his conversations with him upon that occasion which do not indicate that at the time of his return to Winnemucca he was then in such a mental condition as not to know what he was doing and to be responsible for his acts. The most that can be said from the evidence of the witness Ferguson is that the appearance of Goodwin at the time of his return was that he had recently been upon a protracted spree. The evidence is quite convincing that Goodwin was a man addicted to the liquor habit, and would at frequent intervals drink to excess, when he would become totally irresponsible. It is quite clear, however, that Goodwin was not always drunk; that he was sober part of the time and transacted business; that even when drinking he was not always entirely incapacitated.

Upon the assumption that the evidence was sufficient to establish the fact that Goodwin was so drunk at the time he gave the note and mortgage as not to know the nature of his acts, the court below held the law to be that instruments thus executed were not merely voidable, but were absolutely void, not only as against the person executing the instrument, but as against third parties as well.

Volume 6, Ruling Case Law, p. 595, sec. 6, discussing the question of the validity of a contract entered into by person while in a state of complete intoxication says:

"The law now regards the fact of intoxication and not the cause of it, and regards that fact as affording proof of want of mental capacity. A completely intoxicated person is generally placed on the same footing as persons of unsound minds. One deprived of reason and understanding by reason of drunkenness is for the time as unable to consent to the terms of a contract as are persons who lack mental capacity by reason of insanity or idiocy. A person who at the time of making a contract is completely intoxicated may avoid his contract notwithstanding the fact that his intoxicated condition may have been caused by his voluntary act and not by the contrivance of the other party to the contract,

## Opinion of the Court—Norcross, C. J.

unless the contract sought to be repudiated is merely the formal execution of a prior agreement, made when the party was not intoxicated. Some courts have even gone to the extent of saying that a contract by a person who is completely intoxicated is void. The word 'void' seems, however, to have been used as the equivalent of 'voidable.' At all events such statements, if they are to be taken literally, are opposed to the weight of authority which supports the rule that a contract entered into by a party who is so drunk as not to know what he is doing is voidable only, and not void, and may be ratified by such party when he becomes sober. In fact he will be deemed to have ratified the contract unless within a reasonable time after becoming sober he takes steps to disaffirm it. A third person cannot therefore invalidate a contract by an intoxicated person if the real party affected does not repudiate the same."

If the law is as stated in the paragraph quoted, it is conclusive of this case, for, assuming Goodwin to have been drunk at the time, there is no showing that within a reasonable time after becoming sober he took any steps to disaffirm his contracts, or by word or act attempted to repudiate the same prior to the foreclosure suit.

There is eminent authority for holding that, where drunkenness is so complete as to suspend all rational thought, an instrument signed by a party while in such condition is void, even in the hands of a *bona fide* holder without notice. (1 Dan. Neg. Inst. 5th ed. sec. 214; Parsons, Bills & Notes, 151.)

The case of *Green v. Gunsten*, 154 Wis. 69, 142 N. W. 261, 46 L. R. A. n. s. 212, relied upon by the court below as stating the better doctrine, adopts the view that a note executed by a person when so intoxicated as to destroy the faculties of his mind is "absolutely void as between the maker and payee," and by virtue of the provisions of the statute of that state it is void in the hands of a *bona fide* holder for value.

Whether a note and mortgage, assuming them to be

void as between the maker and the payee, or even as between the maker and an assignee of the note and mortgage for value, can be defeated by a third party, not in any way in privity with any of the parties to the instrument, upon the ground it is void as against the whole world because of the incapacity of the maker, is a question upon which little, if any, authority directly in point may be found.

Assuming, however, that respondent Lupin may, in defense of the foreclosure suit, set up that the note and mortgage are void because of the mental incapacity of the maker at the time to execute the same, certainly no less degree of proof of such incapacity would be required upon his part than in case of a party attempting to establish his own incapacity.

The case of *Green v. Gunsten*, *supra*, says:

"Intoxication merely to the extent that he cannot give the attention to it that a reasonably prudent man would be able to give is not sufficient. (*Wright v. Waller*, 127 Ala. 557, 29 South. 57, 54 L. R. A. 440.) See authorities cited in note as to degree of intoxication that will avoid a contract."

In a note to the case of *Miller v. Sterringer*, 25 L. R. A. n. s. 596, which is stated to be supplementary to the note to the case of *Wright v. Waller*, 54 L. R. A. 440, the writer of the note says:

"It is stated in the earlier note that, in accordance with the weight of authority, it must be shown that a man was incapable of exercising judgment, of understanding the proposed engagement, and of knowing what he was about when he entered into the contract, or else it would be held binding. The more recent cases assert the same general rule."

In *Burnham v. Burnham*, 119 Wis. 509, 97 N. W. 176, 100 Am. St. Rep. 895, the court said:

"A person addicted to the habitual and excessive use of intoxicating liquor is not incompetent to enter into contracts and convey property, unless it appears that

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Opinion of the Court—Norcross, C. J.

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actual intoxication dethroned his reason, or that his understanding was so impaired as to render him mentally unsound when the act was performed.”

4. As before pointed out, there is no testimony in this case relative to the condition of Goodwin on the day he gave the note and executed the mortgage. It is entirely a matter of inference based on his appearance some five days later and from the fact that he had the habit of becoming grossly intoxicated at more or less frequent intervals. He was not drunk when he returned to Winnemucca, but bore evidence of having been drinking to excess at some recent date. His signatures to the notes and mortgage, it is claimed, bear evidence of having been written when in an intoxicated condition, and were not in the same free hand as was his signature written when sober. It is contended that, as these signatures have not been brought to this court, all the evidence is not before us. If these signatures might be deemed controlling, there would be great merit in this contention, but it would be quite impossible for a court or jury to say whether the signature was that of a man under the influence of liquor or that of a man in a highly nervous condition following a protracted spree.

5. There is one fact which we think ought to be considered as controlling in the absence of direct evidence upon the question of the mental capacity of Goodwin at the time he executed the note and mortgage. Attached to the mortgage is the certificate of a notary public to the effect that he acknowledged before that officer that he executed the instrument in question. The certificate of the notary is *prima facie* evidence of the due execution of the mortgage. (Rev. Laws, 1043, 1045; *Musgrove v. Waitz*, 14 Nev. 77; *Blaisdell v. Leach*, 101 Cal. 405, 35 Pac. 1019, 40 Am. St. Rep. 65; 1 R. C. L. p. 260, sec. 18; 1 C. J. 784, 886, 889.)

6. The evidence in this case only amounts to a conjecture or suspicion that Goodwin was not in sufficient possession of his faculties at the time he executed the

## Points decided

mortgage and is insufficient to overcome the *prima facie* evidence of due execution made out by the notary's certificate. (17 Cyc. 754.)

The judgment and order denying a new trial are reversed.

[No. 2208]

BANK OF ITALY (A CORPORATION), APPELLANT, v.  
C. P. BURNS, AND A. A. BURKE, AS SHERIFF OF  
WASHOE COUNTY, STATE OF NEVADA, RESPONDENTS.

[156 Pac. 932]

1. PROPERTY—POSSESSION AS EVIDENCE OF OWNERSHIP.

The circumstances surrounding the passing of possession of a car from consignor to consignee not being disclosed, a presumption of law is raised, under the rule that possession of property is *prima facie* proof of ownership.

2. JUDGMENT—CONCLUSIVENESS—PRIVITY—POSSESSION OF PROPERTY—PERSONS BOUND.

Under the rule that judgments are conclusive and binding not only on the parties to the action in which it was rendered, but on persons in privity with them in respect to the subject-matter of the litigation, where after possession of a car had passed from P. to C., and in an action by B. against C. it had been attached and judgment rendered for B., a bill of sale of the car was given by P. to I., the judgment is admissible to show title and right of possession in B. in replevin for the car by I. against B.

ON PETITION FOR REHEARING

1. PRESUMPTION OF OWNERSHIP—BILL OF SALE.

While presumption of ownership which flows from possession may be overcome by showing that some person other than the one in possession is the real owner, the mere introduction in evidence of an alleged bill of sale by a claimant of the property not in possession does not tend to give such claimant a stronger title than could have been asserted by the original consignor of the property who executed the bill of sale.

2. SALES—JUDGMENT—PRIVITY.

The purchaser who acquires property after suit brought in which title to the property is involved is privy to the judgment; but, on the other hand, a purchaser of property before such suit is brought is not privy to the judgment.



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Argument for Respondents

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APPEAL from Second Judicial District Court, Washoe County; *Thomas F. Moran*, Judge.

Replevin by Bank of Italy against C. P. Burns and A. A. Burke, Sheriff of Washoe County. Judgment for the defendants, and plaintiff appeals. **Affirmed.**

*Mack & Green*, for Appellant:

The court erred in admitting testimony offered by the defendants and objected to by plaintiff. There is no evidence whatever to sustain the judgment, but a complete showing that the property belonged to appellant. The judgment roll and the writ of attachment in the case of C. P. Burns against the Consolidated Motorcar Company should have been excluded. It is a generally accepted rule that a transaction between two parties in judicial proceedings ought not to be binding upon third parties. (Jones on Evidence, par. 605; *Geller v. Huffaker*, 1 Nev. 22; Greenleaf on Evidence, vol. 1, pars. 522, 523; *Carter v. Bennett*, 4 Fla. 352; *Costello v. Burke*, 63 Iowa, 361; *Henderson v. Western Ins. Co.*, 10 Rob. 164, 43 Am. Dec. 586; *Cravens v. Jameson*, 59 Mo. 73; *Pratt v. Jones*, 64 Tex. 694; *Duncan v. Helm*, 8 Gratt. 68; *Lardlaw v. Kline*, 8 W. Va. 218; *Homer v. Landis*, 56 Atl. 305; *Hall v. Grace*, 60 N. E. 932; *Rothchild v. Schwarz*, 59 N. Y. S. 527; *Bell v. Staache*, 14 Cal. 203.) "Recitals in an instrument are not evidence as against strangers to the instrument." (14 Ency. of Evidence, 698; *Oliver v. Ellzy*, 11 Ala. 632; *Dennis v. Struck*, 108 S. W. 957; *Sonoma Water Co. v. Lynch*, 50 Cal. 503.)

The presumption of ownership from possession never prevails against the true owner. The mere possession of property is only *prima facie* evidence of title. (*Hanson v. Chiatovich*, 13 Nev. 398; *Hoppin v. Avery*, 49 N. W. 889; *Wright v. Solomon*, 19 Cal. 76.)

*Dodge & Barry*, for Respondents:

Possession is *prima facie* evidence of ownership. Where a person is in undisputed possession of goods or chattels, the law presumes that they are his, and he cannot be deprived of them unless the claimant, by direct

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Opinion of the Court—Coleman, J.

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proof, shows a better right to their possession. (Greenleaf on Evidence, vol. 1, sec. 34; 9 Ency. of Evidence, 260; 16 Cyc. 1070; *Goodwin v. Garr*, 8 Cal. 616; *Trevarrow v. Trevarrow*, 31 N. W. 908; *Amick v. Young*, 69 Ill. 542.)

In an action of replevin, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of the defendant's title. (24 Am. & Eng. Ency. Law, 483; *Davis v. Warfield*, 38 Ind. 461.)

The burden was upon the plaintiff to prove his title. As he stood upon the bill of sale, it was his duty to prove who was the receiver, that it was the receiver's signature, and that the receiver had authority from the court to sell. (Beach on Receivers, 218, 253; Smith on Receivership, sec. 34, p. 298; Anderson on Receivers, sec. 598, p. 809; *Hagan v. Holderby*, 125 Am. St. Rep. 960.)

By the Court, COLEMAN, J.:

This is an appeal from a judgment of the district court of Washoe County, and from an order of said court denying a motion for a new trial.

Plaintiff, appellant in this court, brought an action in replevin to recover possession of a certain motor truck. The truck was shipped by the Pope-Hartford Manufacturing Company of Connecticut to the Consolidated Motorcar Company at San Francisco. The bill of lading, with a draft attached, was sent to the plaintiff, with instructions to deliver the bill of lading to the motorcar company upon payment of the draft. The draft was not paid, but in some manner the consignee got possession of the truck and shipped it in its own name to Reno, Nevada, to be sold. Before a sale was made, and while the truck was in Reno, it was attached in an action brought by respondent C. P. Burns. Thereafter the appellant paid the Pope-Hartford Manufacturing Company the amount due on the bill of lading, taking from it a bill of sale for the truck. Upon respondent's refusal to surrender possession of the truck to appellant upon demand, this action was brought, resulting in the judgment in favor of respondent. The name of the Consolidated Motorcar Company was changed

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to Pope-Hartford Company of California after the car in question had been shipped.

It is the contention of appellant that, since the Consolidated Motorcar Company did not pay the draft drawn upon it by the Pope-Hartford Company of Connecticut, the Bank of Italy had no authority to surrender to it the bill of lading, and that hence no title passed from the Pope-Hartford Company of Connecticut to the Consolidated Motorcar Company, and consequently no right or title was acquired by the attachment proceedings.

This contention makes necessary a consideration of the evidence in the case. The only witness called on the part of appellant who gave testimony concerning the disposition which was made of the truck in question was one W. M. Phelps, who was the representative of the Pope-Hartford Company for the entire Pacific Coast. He testified that it was his duty to keep track of all shipments made by the said company and to see that all drafts were paid, and proceeded:

"Q. Then what did you or your people do with that truck after it was unloaded into the warehouse, if you know? A. Well, one of the parts of my duties are, on the coast here, in shipments that are made by the Pope Manufacturing, when cars arrive here, either San Francisco, Portland, or Seattle, Los Angeles, or other places, if they are not taken up promptly, the Pope Manufacturing Company, when any of our shipments are delayed, and are not taken up, a part of my duties are, whenever I get any information on this point—I have a record of these shipments—I go to these places and check these cars up. Now, I also have a record, as soon as the draft is paid, the Pope Manufacturing Company advises me of the receipt of the payment on that draft. Not having received notification of the payment of this draft on my return up the Northwest—I forget, just; Seattle, Portland, up there some place—in checking up the cars on the records I noticed the absence of this three-ton truck, and I immediately went to the bank and inquired what had become of the truck. They informed me that the

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dealers there in San Francisco had a sale for it in Reno, Nevada, and had shipped it there. I asked them 'on whose authority they had shipped the truck from the warehouse without paying the draft,' and they said they 'had done that on their own initiative, with the understanding that there was a sure sale for it here, and that, if it was not, it would be returned immediately.' I notified them at the time that that was sufficient evidence for us or our corresponding bank for us to demand payment of that draft. I immediately notified the Pope Manufacturing Company. They, in turn, made a demand on the Bank of Italy through the bank under which this draft was drawn to the Bank of Italy for the Pope Manufacturing Company for that truck.

"Q. Was that the consideration for which this bill of sale was given? A. Yes, sir.

"Q. As a matter of fact, did the motorcar company—whatever you call it—Mr. Barry is technical. \* \* \*

Q. Did the Consolidated Motorcar Company ever have anything in the nature of possession of this car, or have any right, title, or interest in it at any time?

"Mr. Barry—We object on the ground that it is a conclusion; let him state the facts.

"Q. What title, interest, or possession did the Consolidated Motorcar Company have in this car?

"Mr. Barry—I object on the ground it is calling for a conclusion.

"A. What title?

"The Court—It calls for a conclusion. Proceed.

"Q. Well, then, please state if you know what—whether the Consolidated Motorcar Company ever had possession of this car—this one, this particular one in question. A. To my knowledge they never had possession of it.

"Q. Will you state whether they paid for the car at any time? A. They never did; no, sir.

"Q. Will you state whether or not they obtained from the Pope-Hartford Company of Connecticut—whether the receiver of the company, the bill of lading by which the car was carried from Hartford, Conn., to San Francisco?

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Opinion of the Court—Coleman, J.

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A. Well, if they received that they received it from the Bank of Italy and they could not get that from the Bank of Italy without paying the draft.

"Q. Then you, as agent of the company, never did deliver to them that— A. No, sir.

"Q. Bill of lading? A. No, sir.

"Q. Do you know whether or not the Pope-Hartford Company of Connecticut was in any wise indebted to the Consolidated Motorcar Company?

"Mr. Barry—Objection on the ground that it is immaterial.

"Q. Or whether or not there was any indebtedness due to the Pope-Hartford Company of California from your company?

"Mr. Barry—Object that it is immaterial.

"The Court—Where is the relevancy of this, Judge?

"Mr. Mack—To show that there was no moneys on deposit or anything due from the Pope-Hartford Company to pay for this car in favor of the Consolidated Motorcar Company.

"The Court—Sustain the objection to the question in its present form.

"Q. Do you know about what that car is worth, or was worth this year? A. Well, the retail price of it was \$3,600.

"Q. \$3,600? A. Yes, sir.

"Q. That would be to the dealer? A. That was the regular retail price.

"Q. The dealer gets his commission out of that on the sale? A. Yes.

"Q. To whom, if you know, was the car shipped to Reno? A. Well, the only information I got, when I discovered that this car had been shipped and had not been paid for, was that, if I remember correctly, the bank informed me that they had shipped it to a concern by the name of Burns & Trosy; I think was the name.

"Q. Did Mr. Burns and Trosy pay for it? A. Well, they didn't pay us for it, because we never had— Our business dealings were direct with the Bank of Italy.

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"Q. So far as your company is concerned, they didn't pay you a cent? A. Not a cent; no, sir."

On cross-examination the witness testified:

"Q. When was that car shipped from the East, do you know? A. I cannot tell the date; no, sir.

"Q. And it was shipped with the draft attached to the bill of lading, was it not? A. Yes, sir.

"Q. And this draft was for the factory's price? A. Yes, sir.

"Q. And that was shipped to San Francisco to the Consolidated Motorcar company? A. To their order; yes, sir. \* \* \*

"Q. And had the draft at that time been paid? A. No, sir.

"Q. And the car was afterwards sent to Burns & Trosy by the Consolidated Motorcar Company? A. Through their orders, I believe.

"Q. Then, the Bank of Italy must have stood good for the amount of the draft; that is, you would consider it so? A. Well, I don't know what arrangement they had with the Pope-Hartford Car Company of California. They shipped the car, or it was shipped. \* \* \*

"Q. You don't know what arrangement the Pope Company of California or the Consolidated Motorcar Company made with the Bank of Italy do you? A. No; I don't.

"Q. You don't know whether they paid the Bank of Italy or borrowed the money from the Bank of Italy or what kind of an arrangement, if any? A. No; I cannot say that.

"Q. But they had to make some arrangement sufficient to get the truck out of the warehouse? A. Unquestionably. \* \* \*

"Q. Of course, this car was released; you looked to the bank, did you? A. Yes, sir."

From the foregoing extracts it will be seen that the witness did not claim to know the real circumstances under which the Consolidated Motor Car Company or the Pope-Hartford Company of California, to which the name was changed, acquired possession of the truck. So far

as appears, the Bank of Italy may have surrendered the bill of lading, agreeing to remit the amount of the draft and to look to the consignee for the payment to it of the amount of the draft. Plaintiff was in possession of the facts, but did not see fit to disclose them. It has been said:

"We believe the rule upon this subject is properly laid down in Cyc., which reads as follows: 'Failure to call an available witness possessing peculiar knowledge concerning facts essential to a party's case or to examine such witness as to the facts covered by his special knowledge, especially if the witness be naturally favorable to the party's contention, gives rise to an inference, sometimes denominated a "strong presumption of law," that the testimony of such uninterrogated witness would not sustain the contention of the party. \* \* \* ' (16 Cyc. p. 1062.)" (*Sherman v. S. P. Co.*, 33 Nev. 402, 111 Pac. 422, Ann. Cas. 1914A, 287.)

Whether or not this rule is applicable to the case at bar, we do not deem it necessary to decide.

1. Whatever the real facts leading up to the acquiring of possession of the motor truck by the consignee, it cannot be disputed that the possession of the truck did, in fact, pass from the consignor to the consignee. Where the circumstances surrounding the change of possession are not disclosed, it seems to us that we are bound by the presumption of law which flows from possession. That possession of property is *prima facie* proof of ownership is a rule of law which this court has had occasion to state in several cases; the latest being *Shearer v. City of Reno*, 36 Nev. 443, 136 Pac. 710. See, also, *Gordon v. District Court*, 36 Nev. 1, 131 Pac. 134, 47 L. R. A. n. s. 178; *Patchen v. Keeley*, 19 Nev. 413, 14 Pac. 351; *Jones on Evidence*, sec. 17; 9 Ency. of Evidence, p. 260B; *Goodwin v. Garr*, 8 Cal. 616; 16 Cyc. 1074; 10 R. C. L. p. 877.

2. It is contended by counsel for appellant that the trial court erred in admitting in evidence the judgment roll in the attachment suit of *Burns v. Consolidated Motor-car Company*, for the reason that the Bank of Italy was not a party to that action. It appears from the record of

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Opinion of the Court—Coleman, J.

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the case at bar that the truck in question was attached in the suit of *Burns v. Consolidated Motorcar Company* on July 25, 1913, and that appellant did not obtain its alleged bill of sale to the truck from the receiver of the Pope-Hartford Manufacturing Company of Connecticut until January 7, 1914, long after the possession of the car had passed from the last-named company to the Consolidated Motorcar Company, and after the attachment. Thus it will be seen that, while appellant was not a party to the suit, it was necessary that the judgment roll in that case be introduced in evidence to show respondents' title and right of possession. According to appellant's theory of the law, even if the Consolidated Motorcar Company had paid the draft, got the bill of lading, taken possession of the truck in the usual course of business and shipped it to Reno to be sold, the judgment roll could not be introduced in evidence. This contention is not founded upon either reason or authority, and it should not require the citation of authorities to refute it. However, if authority be deemed necessary on this point, we quote as follows from 23 Cyc. 1253:

"A judgment is conclusive and binding, not only upon the parties to the action in which it was rendered, but also upon persons who are in privity with them in respect to the subject-matter of the litigation."

No error appearing in the record, it is ordered that the judgment and order appealed from be affirmed.

#### ON PETITION FOR REHEARING

By the Court, COLEMAN, J.:

Appellant has filed a petition for a rehearing in this case, in which it is contended that our interpretation of the testimony is incorrect.

We have again considered the evidence, and are convinced that no other conclusion than the one formerly reached by us can be sustained.

1. It is also insisted that since possession is only *prima facie* evidence of ownership, the presumption of ownership which we found to have been in the Consolidated



Motorcar Company at the time of the attachment by Burns is overcome by the bill of sale of appellant. It is unquestionably true that the presumption of ownership which flows from possession merely can be overcome by showing that some person other than the one in possession is the real owner. But while this is true as a general proposition of law, the mere introduction in evidence of the alleged bill of sale to appellant did not tend to give it a stronger claim to the car than could have been asserted by the Pope-Hartford Company of Connecticut, the consignor. If appellant had followed up the introduction of its bill of sale by showing affirmatively that the Bank of Italy improperly surrendered the possession of the car to the Consolidated Motorcar Company, there would be some foundation for the contention.

2. Fault is also found with what we said in passing upon the action of the trial court in admitting in evidence the judgment roll in the attachment suit of *Burns v. Consolidated Motorcar Company*. We quote from the petition for rehearing:

"The court further in its decision says that the plaintiff is bound by the judgment which we claimed was erroneously admitted in evidence, because we are privy to that judgment. This is not the law and is not the fact. In order to be a privy to the judgment, the title of the party to the truck must have been in question and must have been passed upon by the court. The mere fact that the property was under attachment for the debt of the Consolidated Motorcar Company does not make the Bank of Italy the true owner of the property privy to that judgment."

Numerous authorities are quoted to sustain counsel's contention. We quote from two of them:

"Every person is privy to a judgment or decree who has succeeded to an estate or interest held by one who was a party to such judgment or decree, if the succession occurred after the bringing of the action." (24 Am. & Eng. Ency. Law, 2d ed. p. 746.)

The converse is stated in another quotation:

"It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit." (Freeman on Judgments, vol. 1, sec. 162, 4th ed.)

From the authorities quoted, it appears that when one purchases property *after* a suit is brought, in which the title to it is involved, the purchaser is privy to the judgment; but, on the other hand, if he purchases *before* the suit is brought, he is not privy to the judgment. From the opinion in this case it appears that appellant did not obtain its bill of sale until nearly seven months after the suit was brought. The fact that the Pope-Hartford Company of Connecticut, from whom appellant got its bill of sale, was not a party to the attachment suit, matters not, for the reason that its title was cut off by reason of the possession of the car passing to the Consolidated Motorcar Company, and the subsequent proceedings.

Respondent makes a motion to dismiss the petition for rehearing for the reason that a copy of it was served by mail instead of in the manner provided in chapter 48, Revised Laws, for the service of notices and other papers.

Rule 15 of this court does not provide in what manner a copy of such petition shall be served; and in view of the fact that we have concluded that the petition should be denied, for the reasons already stated, we do not find it necessary to pass upon the motion, but feel that it would not be out of place to call the attention of the bar to the seriousness of the point suggested.

The petition for a rehearing is denied.

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## Argument for Relator

[No. 2200]

P. D. MCLEOD, RELATOR, v. THE DISTRICT COURT  
OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF NEVADA, IN AND FOR THE  
COUNTY OF NYE, AND MARK R. AVERILL,  
JUDGE THEREOF, RESPONDENTS.

[157 Pac. 649]

## 1. CERTIORARI—FUNCTION OF WRIT—ACT OF DISTRICT COURT.

On *certiorari* to review the act of the district court in striking items from the cost bill, the scope of the inquiry permissible is that of jurisdiction, and, if the act of the district court was within its jurisdiction, the inquiry ceases, and the writ has no function to perform; an authorized act of a court not being reviewable by *certiorari*.

## 2. COSTS—APPEAL FROM JUSTICE'S COURT—STATUTES.

Where a case comes to the district court on appeal from justice's court, costs in the district court do not follow as of course, but come under the provisions of Rev. Laws, 5380, whereby the district court is authorized and directed to exercise its discretion in cases other than those mentioned in section 5377, prescribing allowance of costs as of course.

## 3. COSTS—OBJECTION TO BILL OR ITEMS—TIME.

Until the discretion of the district court on appeal from justice's court was exercised in fixing costs, there was nothing in the statutes or procedure preventing the party against whom the costs might be assessed from appearing to object to the whole cost bill, or any items therein.

## 4. CERTIORARI—DISCRETION OF COURT—OBJECTIONS TO COST BILL.

In an action in the district court on appeal from justice court, where by statute it was the province and duty of the court to exercise its discretion in allowing items of cost before the same could become part of the judgment, even though no objections were filed, error in refusing to strike objections to the cost bill is not reviewable on *certiorari*.

ORIGINAL PROCEEDING. *Certiorari* by P. D. McLeod, relator, against the District Court of the Fifth Judicial District in and for the County of Nye, and Mark R. Averill, Judge thereof. **Writ dismissed.** [Petition for rehearing pending.]

P. M. Bowler and William Forman, for Relator:

The lower court was without jurisdiction to consider and rule upon defendant's so-called objection to the cost bill and motion to retax costs, no ground therefor having

## Argument for Relator

been specified nor good cause shown for the exercise of any discretionary power of the court. To invoke the exercise of discretionary jurisdiction, it is imperatively necessary that such a motion be noticed for hearing and good cause be shown.

Discretion can be exercised only in the absence of positive law or fixed rule when in furtherance of justice, upon good cause shown, and upon notice to the adverse party. (*State v. Wood*, 23 N. J. Law, 560; *Goodwin v. Prime*, 42 Atl. 785; *The Styris v. Morgan*, 186 U. S. 1, 46 L. Ed. 1027; Rev. Laws, 5084.)

The lower court had no discretion in the matter of costs. In this character of case, the prevailing party is entitled to costs "as of course." There was a gross abuse of discretion, and its exercise was and is prohibited by positive statute. (Rev. Laws, 1995, *et seq.*; Rev. Laws, 200, 2001, 2012, 5377, 5379, 5387; *Bennet v. Kroth*, 1 Am. St. Rep. 248; *Benson v. Brann*, 134 Cal. 42; *Fox v. Hale & Norcross M. Co.*, 122 Cal. 219; *Quillahan v. Morrissey*, 73 Cal. 297.)

*Certiorari* is the only appropriate remedy where the court was, as in this case, without jurisdiction. (*Territory v. Doan*, 60 Pac. 892; *L. A. City W. Co. v. Superior Court*, 124 Cal. 386.)

The most important office and function of the writ of *certiorari* is the keeping of inferior courts and tribunals within proper bounds against an assumption of jurisdiction. (4 Ency. Pl. & Pr. 262; *People v. Board Delegates*, 14 Cal. 479; *Chapman v. District Court*, 29 Nev. 159; *Peacock v. Leonard*, 8 Nev. 84; *Martin v. District Court*, 13 Nev. 85; *People v. Board*, 39 N. Y. 81; *State v. District Court*, 46 Pac. 260; 6 Cyc. 745, 746; *State v. Guinotte*, 50 L. R. A. 787; *Harris v. Barber*, 128 U. S. 366, 32 L. Ed. 697; *In Re Wixom*, 12 Nev. 223.)

The power exercised by the lower court was unauthorized, a usurpation of jurisdiction, and deprivation of relator of a property right, which was his of course; the order complained of was confiscatory, in violation of both statutory and constitutional rights, and absolutely null

## Argument for Relator

and void. (*Coker v. Superior Court*, 58 Cal. 177; *Maurer v. Mitchell*, 52 Cal. 291; *Dalzell v. Superior Court*, 67 Cal. 453, 454; *Hall v. Superior Court*, 68 Cal. 24; *Levy v. Superior Court*, 66 Cal. 292; *Matthews v. Superior Court*, 68 Cal. 631; *Carlson v. Superior Court*, 70 Cal. 628; *Steel v. Steel*, 1 Nev. 27; *State v. Commissioners*, 5 Nev. 317; *Morgan v. Commissioners*, 9 Nev. 360; *Burris v. Kennedy*, 108 Cal. 339.)

An order of the district court, which it is without jurisdiction to make, is subject to review and annulment by *certiorari*. (*State v. District Court*, 46 Pac. 260.)

Where there is a want of jurisdiction, the writ will not be denied, especially where there are errors or abuses going to the jurisdiction complained of. (6 Cyc. 745, 746; *State v. Guinotte*, 50 L. R. A. 787.)

Where there is an erroneous exercise of jurisdiction, a writ of review will issue. (*Harris v. Barber*, 129 U. S. 126, 32 L. Ed. 697; 6 Cyc. 750, 751; *In Re Wixom*, 12 Nev. 219; *State v. Snohomish*, 39 Pac. 644; *In Re Rourke*, 13 Nev. 253.)

When the subject-matter, such as costs, upon which the jurisdiction of the court rests, is limited and restricted by statute, the court must look to that statute for its jurisdiction, and cannot by its mere decision, acquire jurisdiction over a matter therein denied to it. A judgment or order in excess of jurisdiction may be reviewed on *certiorari*. (*Baker v. Superior Court*, 71 Cal. 583, 12 Pac. 685; *Gibson v. Superior Court*, 83 Cal. 643, 24 Pac. 152; *Jackson v. Boy*, 16 South. 290; *Maynard v. Bailey*, 2 Nev. 313; *State v. Washoe County*, 5 Nev. 317; *State v. Humboldt County*, 6 Nev. 100; *Hetzell v. Commissioners*, 8 Nev. 359; *Maxwell v. Rives*, 11 Nev. 213; *In Re Rourke*, 13 Nev. 253; *Esmeralda County v. District Court*, 18 Nev. 438; *Levan v. District Court*, 43 Pac. 574; *North v. Joslin*, 26 N. W. 810.)

The leading object of the writ of *certiorari* is to keep inferior tribunals within the bounds of their jurisdiction, without or in excess of which *certiorari* lies to annul their proceedings. (*State v. Washoe County*, 5 Nev. 267;

## Argument for Respondents

*Gamble v. Silver Peak Co.*, 35 Nev. 326; *Floyd v. District Court*, 36 Nev. 363.)

*J. K. Chambers*, for Respondents:

The demurrer to the petition should be sustained. The application shows on its face that the lower court had jurisdiction over both the parties and the subject-matter in the case under review; and if any error or irregularity was committed, it cannot be reviewed in this proceeding. The application shows that a clear legal duty was imposed by law upon respondent which was purely ministerial, and in which respondent was precluded from exercising any discretion; and that relator had a plain, speedy, and ample remedy by proper motion in the lower court, and a right of action against the defendant in the case under review for his costs that were allowed by law.

The respondent having had jurisdiction to hear and determine the question of costs and to settle the memorandum, it is immaterial in this proceeding whether its decision was right or wrong, and its decision cannot be reviewed on *certiorari*. (*Phillips v. Welch*, 12 Nev. 158; *Quinn v. District Court*, 16 Nev. 76; *Sheer v. Superior Court*, 96 Cal. 653; *History Co. v. Light*, 97 Cal. 56; *In Re Wixom*, 19 Nev. 219.)

All want of notice or any defect in the notice to retax costs was waived by the relator in his general appearance at the hearing of said motion. Having voluntarily submitted himself to the jurisdiction of the court, relator expressly waived any objections to the regularity of the proceedings in regard to the retaxing of costs, and any objection to the want of notice of regularity of service. (*State v. McCullough*, 3 Nev. 202; *Union Pacific v. Moffett*, 12 Colo. 310; *Shell v. Leland*, 45 Mo. 289; *Ankeney v. Blackenson*, 7 Or. 407; *Lane v. Ohio River R. R.*, 14 S. E. 123; *Morris v. Miller*, 40 Pac. 60; *Zeigler v. People*, 164 Ill. 53; *Wilsie v. Maynard*, 21 Iowa, 107; *Manderschile v. Plymouth*, 69 Iowa, 270; *Hacker v. Petie*, 2 Or. 89; *Hecker v. Fadie*, 2 Or. 89.)

The district court has jurisdiction to settle and allow

## Argument for Respondents

costs. Jurisdiction as applied to a particular claim or controversy is the power to hear and determine that claim or controversy; and if there is any error in not allowing costs to relator in the lower court, it was not an excess of jurisdiction and the action cannot be reviewed upon *certiorari*. (*State v. District Court*, 23 Nev. 245; *State v. District Court*, 16 Nev. 75; *State v. District Court*, 26 Nev. 256; *State ex rel. Thompson v. District Court*, 23 Nev. 243; *State v. Pike*, 32 Nev. 109; *State v. District Court*, 26 Nev. 253.)

*Mandamus* is the proper remedy to compel a judicial officer to perform a ministerial act, or to perform a duty imposed upon him by law where he has no discretion. (*State v. Murphy*, 19 Nev. 89; *State v. Curler*, 4 Nev. 445; *Humboldt County v. Churchill County*, 6 Nev. 30; *Taylor v. Salt Lake Co.*, 2 Utah, 405; *Hudson v. Parker*, 39 U. S. 424; *Commonwealth v. McLaughlin*, 14 Atl. 377; *People v. Hubbard*, 22 Cal. 34; *Manor v. McCall*, 5 Ga. 522; *People v. Hallett*, 1 Colo. 352; *State v. Fisher*, 21 S. W. 503.)

The remedy by *certiorari* would not be either plain, speedy, or adequate. *Mandamus* is the proper remedy where a ministerial duty is imposed upon a public officer by law and where the officer has no discretion. In this case the affidavit of relator states that there was a plain legal duty imposed by law upon the respondent to tax the costs in this action against the defendant in the lower court. The affidavit also shows that the relator had a clear legal right to the costs. This being so, we have a case where a clear legal duty imposed by law rested upon the respondent to perform a specific act in which he had no discretion, and we have also a clear legal right resting in the relator. In such a case *mandamus* is the only remedy that could give adequate relief to the relator. (*State v. Board of Commissioners*, 30 Nev. 477.)

Taxation of costs in the lower court cannot be reviewed on *certiorari*. (*Quinn v. District Court*, 16 Nev. 76.) Section 5690, Revised Laws, provides that the writ of *certiorari* shall not be extended further than to determine

## Opinion of the Court—McCarran, J.

whether the inferior tribunal has regularly pursued its authority, and does not permit inquiry into any irregularity or question beyond that of jurisdiction. (*Knapp v. District Court*, 31 Nev. 44; *Maynard v. Bailey*, 2 Nev. 313; *Phillips v. Welch*, 12 Nev. 175; *C. P. R. R. Co. v. Placer County*, 43 Cal. 312; *Monreal v. Bush*, 46 Cal. 670; *Quinchard v. Board*, 133 Cal. 664; *People v. Lumby*, 29 Cal. 632; *In Re Wixom*, 12 Nev. 209.)

On *certiorari* to review an order made by a lower court, the only question that can be considered at the hearing is that of jurisdiction. Any error in the order complained of, however erroneous and flagrant, cannot be considered in this proceeding. The affidavit for the writ fails to show that the lower court exceeded its jurisdiction; at most, all that can be claimed is that there were errors or irregularities in the exercise of jurisdiction. The excess of jurisdiction claimed by relator pertains exclusively to the action of respondent regarding the memorandum of costs filed in the lower court and the action taken by respondent thereon. The ruling of the lower court on a memorandum of costs cannot be reviewed on *certiorari*, as no question of jurisdiction can ever arise concerning the subject-matter of the inquiry. (*Miller v. Highland*, 91 Cal. 103; *Quinn v. District Court*, 16 Nev. 75; *Phillips v. Welch*, 12 Nev. 158; *In Re Wixom*, 12 Nev. 219; *State v. Mack*, 26 Nev. 253; *State v. District Court*, 23 Nev. 243; *Sullivan v. Railroad*, 75 Pac. 767; *Fox v. Hale & Norcross*, 122 Cal. 219.)

By the Court, MCCARRAN, J. :

This is a proceeding in *certiorari*. The petitioner was plaintiff in an action commenced in the justice court of Tonopah township against E. E. Bertram for the sum of \$90, balance alleged to be due for services rendered. Judgment in the justice court was rendered in favor of the defendant, Bertram, and from that judgment petitioner appealed to the district court of the Fifth judicial district of the State of Nevada. In a trial held in that court before a jury verdict was rendered in favor of the plaintiff, petitioner herein, for the amount claimed. On



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Opinion of the Court—McCarran, J.

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motion of the defendant, Bertram, the verdict of the jury was set aside, and a new trial was granted by the district court. The case being set down for trial on the 27th day of September, 1915, the following proceedings, as set forth in the minutes of the court, took place:

"P. D. McLeod, Plaintiff, v. E. E. Bertram,  
Defendant.

"The above-entitled case comes on for trial at this time before the court.

"William Forman appears as attorney for plaintiff, and J. K. Chambers appears as attorney for defendant.

"The defendant confesses judgment for \$90.

"It is ordered, upon motion of counsel for plaintiff, that judgment for \$90 and costs be entered in favor of the plaintiff against the defendant, reserving, however, to the defendant the right to proceed as to matter of costs."

Pursuant to the foregoing proceedings, the court entered judgment in the form following:

"This cause coming on regularly for trial on the 27th day of September, 1915, William Forman appearing as counsel for plaintiff, and J. K. Chambers for the defendant, a trial by jury having been expressly waived by counsel for the respective parties, and the defendant, by his attorney in open court, consented that judgment be entered against the defendant for the sum of ninety (\$90) dollars and costs, and the plaintiff in open court accepting said offer.

"Wherefore, by reason of the law, it is ordered, adjudged, and decreed that the plaintiff, P. D. McLeod, do have and recover of the defendant, E. E. Bertram, the sum of ninety (\$90) dollars, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of ----- (\$-----) dollars.

"Judgment rendered this 27th day of September, 1915.

"Mark R. Averill, District Judge."

On the date of the rendition of this judgment, and after the entry thereof in the form above set forth, plaintiff, petitioner herein, filed and served his cost bill, claiming costs in the sum of \$121.70. Three days thereafter, to wit, on the 30th day of September, 1915, the

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Opinion of the Court—McCarran, J.

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attorney for the defendant served upon the attorney for the plaintiff an instrument without entitlement, setting forth the following:

"Now comes the defendant in the above-entitled action and objects to the memorandum of costs filed in said cause, on the ground that the plaintiff is not entitled to any statutory costs, for the reason that the statute makes no provision for costs under the contingencies of this case; that the costs in the case do not follow the judgment, and the plaintiff is only entitled to such costs as may be allowed by the court, and that the costs in this case are entirely under the control of the court, and that he can in his discretion refuse to allow any costs whatever, for the reason that the same is in the district court on appeal from the justice court of Tonopah township, and the statute allows only such costs as are approved and allowed by the court."

While the instrument quoted above was served on attorneys for petitioner on the 30th day of September, the same was not filed with the clerk of the district court until October 2, 1915. On the last-named date, the parties being present in court by their respective attorneys, a motion was made in open court by plaintiff, petitioner herein, to strike from the records the paper so filed, contents of which we quoted above, for the reason that no motion and notice of motion to retax costs had been filed and served in the case, and that the paper purporting to make objections to the cost bill filed by the plaintiff was no such document as could give the court jurisdiction. The motion thus made was overruled by the court. The matter of the allowance of costs and the allowance by the court of the several items set forth in petitioner's cost bill were argued and submitted to the court. On October 4, 1915, the court, having taken the matter under advisement, ordered that all the items contained in plaintiff's (petitioner's) cost bill be stricken out, excepting one of \$17.25, being the clerk's fees.

1. The scope of the inquiry permissible to this court is limited to that of jurisdiction. If the act of the district

court in striking the items from the cost bill was within the jurisdiction of that tribunal, then our inquiry ceases, and the writ of *certiorari* has no function to perform.

2. The procedure in such matters having been prescribed by legislative enactment, which enactment is a part of our civil practice, we turn there first for guidance.

Section 5387, Revised Laws, being section 445 of the Civil Practice Act, prescribes:

"The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve a copy upon the adverse party, within five days after the verdict or notice of the decision of the court or referee, or such further time as the court or judge may grant, a memorandum of the items of his costs and necessary disbursements in the action or proceeding. \* \* \* Within three days after service of a copy of the memorandum, the adverse party may move the court, upon two days' notice, to retax and settle the costs, a copy of which motion shall be filed and served on the prevailing party claiming costs. Upon the hearing of the motion the court or judge in chambers shall settle the costs."

Section 5377, Revised Laws (section 435, Civil Practice Act), prescribing when costs shall be allowed to plaintiff as of course, does not apply here, and none of its terms or provisions have any bearing upon the case at bar. Section 5380, Revised Laws (section 438, Civil Practice Act), in part sets forth:

"In other actions than those mentioned in section 435, costs may be allowed or not, and if allowed, may be apportioned between the parties, or on the same or adverse sides in the discretion of the court. \* \* \*"

In the light of the foregoing statute, we must conclude that costs in the district court, in a case where, as in this case, it comes to that court on appeal from the justice court, do not follow as of course, but rather come under the provisions of the statute whereby the district court is authorized and directed to exercise its discretion. Not only is the foregoing conclusion to be arrived at from the statute itself, but the record in this case as set forth

in the proceedings of the court, wherein it was ordered on motion of counsel for plaintiff that judgment be entered against the defendant, discloses that to the defendant was reserved the right to proceed as to the matter of costs.

3. In view of the nature of the case in the lower court, it makes little difference, as we view it, as to what may have been the substance of the instrument filed by way of objection to plaintiff's cost bill, and, as we will hereafter discuss, it makes little difference when the same was filed or served, so long as the filing and service of the same was prior to the time at which the matter and amount of costs was finally determined by the district court. As to whether or not the plaintiff was entitled to any costs or was entitled to certain specific items of costs was a matter entirely within the discretion of the district court. Until that discretion had been exercised the judgment, in so far as the burden of costs was concerned, was incomplete. Until the discretion of the district court had been exercised in fixing the costs, we find nothing in the statute or in our procedure which would, as we view it, prevent the party against whom the costs might be assessed from appearing for the purpose of objecting to the whole cost bill or any items therein. (*Bringgold v. Spokane*, 19 Wash. 335, 53 Pac. 368.) Our reasoning in this respect must not be construed as applying to cases where, as prescribed by the statute, costs are to be allowed as a matter of course, for in such cases a different rule would apply.

We have been referred to the case of *Brande v. Babcock Hdw. Co.*, 35 Mont. 256, 88 Pac. 949, 119 Am. St. Rep. 858, wherein, following the decision in *King v. Allen*, 29 Mont. 5, 73 Pac. 1107, it was held that a memorandum of costs duly verified and filed within time is *prima facie* evidence that the items were necessarily expended and are properly taxable, unless, as a matter of law, they appear otherwise. But it must be observed that in that case the court very properly said:

"Under section 1866 of the Code of Civil Procedure,

the items complained of could be taxed, and it devolved upon the plaintiff to show that they were not properly taxed."

The case arose in the district court of Montana, and by its very nature was one in which under the Montana act costs would accrue as a matter of course. Where, as in the matter at bar, the discretion of the court constitutes the intervening element in the establishment of costs, we know of no rule such as that asserted in the case of *Brande v. Babcock Hdw. Co.*, *supra*, that would apply.

4. The matter at bar is to be distinguished from the case of *Radovich v. Western Union Tel. Co.*, 36 Nev. 341, 135 Pac. 920, 136 Pac. 704, in that in the Radovich case the trial court erroneously entertained and granted a motion to strike an entire cost bill, objections to which we held to have been waived. That act we held to be in excess of jurisdiction. In this case, however, as the record discloses, the court considered the instrument constituting the cost bill of petitioner, and in the exercise of its discretion, as authorized by the statute, struck therefrom certain items the allowance of which was not a matter of statutory right, but solely within the discretion of the court. The matter of the court having refused to strike the objections to the cost bill in this case, even though it should be admitted to be erroneous, would not affect the proceedings in view of the fact that under the provision of the statute quoted it was the province and duty of the court to exercise its discretion in allowing items of cost before the same could become a part of the judgment, even if no objection had been filed.

The judgment in this case was filed in blank as to the item of costs. The matter of filling in that absent element in the judgment was, under the statute, and indeed under the minute order as made and entered by the trial court at the time of the entry of judgment, a matter with reference to which the trial court was to exercise its discretion. The trial court, as the record discloses, considered the cost bill submitted by petitioner, and struck therefrom certain items, retaining certain others. The

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Coleman, J., dissenting

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exercise of its discretion on the part of the court was an authorized act, and as such, is not reviewable by *certiorari*. (6 Cyc. 756.) That the whole proceeding was within the jurisdiction of the trial court, and that in the exercise of its discretion the court did not exceed its jurisdiction, is to our mind manifest.

The writ should be dismissed. It is so ordered.

NORCROSS, C. J.: I concur.

COLEMAN, J., dissenting:

I dissent. The district court by its judgment settled two things: (1) That plaintiff was entitled to judgment in the sum of \$90; and (2) that he was entitled to judgment for costs. In the minute entry the right of defendant "to proceed as to matter of costs" was reserved. No time in which defendant should proceed was fixed by the minute entry, nor was the manner of his proceeding prescribed; consequently it seems to me that the time and manner fixed by the statute must be deemed to have been contemplated.

The majority opinion quotes the statutory provision under which the prevailing party may file his cost bill and the method whereby the adverse party may take exceptions thereto. Plaintiff, having been awarded a judgment for \$90 and costs, filed his cost bill within the time allowed by law. While defendant did not file a motion to retax costs, or give notice that he would make such a motion, he did cause to be filed a paper which I will treat as having served the same purpose, but which was not filed within the time allowed by law. Plaintiff objected to the consideration of this objection, motion, or whatever it may be termed, but, notwithstanding the objection, the court considered the same, and disallowed all of the items of the cost bill (including the jury fee, which the law requires to be paid before a case is tried), except the clerk's costs. It is my opinion that, in view of the language of the statute, and the objection of the plaintiff, the court had no jurisdiction to consider the objections to plaintiff's cost bill.

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Coleman, J., dissenting

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In the case of *Nicklin v. Robertson*, 28 Or. 278, 42 Pac. 993, 52 Am. St. Rep. 790, under a statute providing for the filing of cost bill and allowing two days thereafter for the adverse party to file objections thereto, and authorizing the clerk to tax the costs, it is said:

"The statute allows the clerk to allow and tax," and the statement, having been filed on the day following, was within the five-day limit, and, "no objections [thereto] having been filed \* \* \* within the time prescribed by law, the clerk had no discretion in the allowance of the items contained in the statement."

In the case of *Killip v. Empire Mill Co.*, 2 Nev. 34, in which notice of motion to move for a new trial was not filed within the time prescribed by law, it was said:

"In this case the judgment was on the 1st day of March, and the adjournment on the same day. If before the end of the 3d of March there was no notice of intention to move for a new trial, no waiver of that notice, and no act which was equivalent to notice, then the court lost jurisdiction of the case."

I think the case just quoted from is squarely in point with the case at bar. Substantially the same question was before the court.

A similar point was before this court in the case of *Clark v. Strouse*, 11 Nev. 76, where it was said:

"It necessarily follows that the court erred in not granting plaintiff's motion to strike from the files the statement on motion for a new trial. The judge having extended the time to file the statement until the 13th day of April, 1875, and no order appearing in the records of the case to have been made before the expiration of that date, and no statement having been filed within that time, the defendant must be considered as having waived his right to file a statement (Practice Act, sec. 197); and the court, as was said by Currey, J., in *Hegeler v. Henckell*, 27 Cal. 492, 'was powerless to rescue the case from the consequences of the defendant's default.'"

In *Elder v. Frevert*, 18 Nev. at page 282, 3 Pac. 237, the court says:

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Coleman, J., dissenting

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"The failure of defendants to file their statement within five days after giving notice of intention to move for a new trial, nothing having been done in the meantime to retain jurisdiction of the matter, operated, by the express terms of the statute, as a waiver of the right to move for a new trial, and no power existed in the district court to reinstate this right. (*Clark v. Strouse*, 11 Nev. 78; *Hegeler v. Henckell*, 27 Cal. 491.)"

See, also, *Robinson v. Benson*, 19 Nev. 331, 10 Pac. 441; *Earles v. Gilham*, 20 Nev. 46, 14 Pac. 586; *State v. Cheney*, 24 Nev. 222, 52 Pac. 12; *Hegeler v. Henckell*, 27 Cal. 492; *Campbell v. Jones*, 41 Cal. 518; *Clark v. Crane*, 57 Cal. 629; *Freese v. Freese*, 134 Cal. 49, 66 Pac. 43.

In 23 Cyc. at page 684, it is said:

"In addition to jurisdiction of the parties and the subject-matter, it is necessary to the validity of a judgment that the court should have jurisdiction of the question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant. \* \* \*

This court has expressed substantially the same idea:

"A judgment may be both erroneous and void. In *Windsor v. McVeigh*, 93 U. S. 282, 23 L. Ed. 914, the court said: 'Though the court may possess jurisdiction of a cause of the subject-matter, and of the parties, it is still limited in its mode of procedure and in the extent and character of its judgment. It must act judicially in all things, and cannot then transcend the power conferred by law.' In *United States v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547, the court defined jurisdiction to be 'the power to hear and determine,' and in *Ex Parte Reed*, 100 U. S. 13, 25 L. Ed. 538, it is defined 'the power to hear and determine and give the judgment rendered.'"  
(*Estate of Foley*, 24 Nev. 312, 51 Pac. 836, 52 Pac. 649.)

The concluding paragraph of the prevailing opinion says that the filling in of the blank in the judgment as to costs was a matter of discretion in the trial court. Conceding it to be a matter of discretion in the trial court to allow or disallow certain items claimed, that discretion could be exercised only in case the jurisdiction of



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Argument for Petitioner

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the court were invoked in the manner provided by law. I think it safe to say that, where the judgment leaves a blank space for costs, as provided by section 5388 of the Revised Laws, it has been the universal practice of the clerks of the courts from time immemorial to insert in the space thus left the amount of costs claimed in the cost bill, if no motion to retax is made as provided by statute.

[NOTE—Petition for rehearing pending.]

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[No. 2229]

IN THE MATTER OF THE APPLICATION OF JOHN  
MURRAY FOR A WRIT OF HABEAS CORPUS.

[157 Pac. 647]

1. INDICTMENT AND INFORMATION—COMPLAINT—INFORMATION AND  
BELIEF—WAIVER OF DEFECT.

The defect that a complaint, charging the relator with a misdemeanor, was insufficient because purporting to be made upon information and belief, instead of upon positive knowledge, was not jurisdictional, and was waived by relator by pleading to the complaint without making an objection upon the ground assigned.

2. HABEAS CORPUS—REGULARITY OF CONVICTION—PRESUMPTION.

On *habeas corpus* to secure the release of one convicted of a misdemeanor in district court on appeal from justice court, it will be presumed that the proceedings in the district court were in every way regular until the contrary is made affirmatively to appear.

**ORIGINAL PROCEEDING.** In the matter of the application of John Murray for a writ of *habeas corpus*. **Proceeding dismissed.**

*William Forman*, for Petitioner:

Neither the justice court nor the district court had jurisdiction over the defendant, the judgment of conviction against him is void, and he should be released under this proceeding from his illegal restraint.

The complaint upon which petitioner was convicted in

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Argument for Respondent

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the lower court does not comply with the provisions of section 7472, Revised Laws, and is violative of the provisions of article 4 of the amendments to the constitution of the United States, as well as of article 1, section 18, of the constitution of the State of Nevada, in that it is not positively verified, but sworn to on "information and belief."

The statutes of Nevada make a distinction between where a complaint is for a felony and where it is for a misdemeanor. In the former, a complaint sworn to may be upon "the knowledge, information, or belief of the party making the same." (Rev. Laws, 6930.) This is held sufficient where the charge was a felony. (*Ex Parte Buncel*, 25 Nev. 426.) Where the alleged offense is a misdemeanor, the complaint must be in writing, and it must be sworn to. "The affidavit or complaint must show all the facts which the statute renders necessary to give the magistrate jurisdiction. According to the rule of the common law, a summary conviction is illegal and absolutely void unless based upon a complaint in writing and verified by oath." (12 Cyc. 323; *Salter v. State*, 25 L. R. A. n. s. 60.)

*Geo. B. Thatcher*, Attorney-General, and *J. A. Sanders*, District Attorney, for Respondent:

The writ of *habeas corpus* is not designed for the correction of errors or mere irregularities, and cannot be substituted for an appeal or writ of error. And where a petitioner is imprisoned under a judgment of conviction for crime, unless the court was without jurisdiction to render the judgment, and the judgment is void and not merely voidable, relief cannot be had by *habeas corpus*, however numerous or gross may have been the errors committed during the trial or in the proceedings preliminary thereto. Petitioner, having put his motion in the district court to dismiss the complaint filed against him in the justice court on the grounds and reasons set forth in his application for the writ in this proceeding, has clearly failed to raise a jurisdictional question, and

## Opinion of the Court—Coleman, J.

therefore his remedy is by appeal. There being no appeal in this case, the writ should be denied. (*Ex Parte Talley*, 112 Pac. 36; *Ex Parte Winston*, 9 Nev. 71; *Ex Parte Gafford*, 25 Nev. 101.)

The record shows that petitioner failed and neglected to direct the court's attention to the point made in his application for this writ, and has waived the question of jurisdiction. (*Ex Parte Talley*, *supra*; *In Re Kummings*, 66 Pac. 332; *State v. Barr*, 38 Pac. 289; *Lewis v. State*, 17 N. W. 366; *State v. Harris*, 61 N. W. 871; *State v. McLain*, 102 N. W. 407.)

The complaint in the lower court was in all respects sufficient. If the words "on information and belief" are objectionable, they are so only upon the grounds of redundancy, and in no way affect the body of the complaint or work any prejudice to the petitioner. (Rev. Laws, 7060; *Brown v. State*, 21 N. W. 454.)

If, after striking these so-called objectionable words from the complaint, enough remains to constitute a valid charge of the offense, the complaint will be sustained. (22 Cyc. 367, 368, 369; 37 Cyc. 614.)

Time is not an essential ingredient of the offense charged. It was alleged to show that the prosecution was not barred by the statute of limitations. The precise time at which an offense was committed need not be stated in the indictment, except when the time is a material ingredient of the offense. (Rev. Laws, 7055; *Brown v. State*, 21 N. W. 454.)

The statement is required to be in writing, but it is not a requirement of the statute that it be made on the personal knowledge of the person so making it. Any other construction of the statute would make the execution of the criminal law impracticable, if not impossible, and permit many offenders to escape from justice. (*State v. Davey*, 62 Wis. 305; *Ex Parte Blake*, 102 Pac. 269.)

By the Court, COLEMAN, J. :

This is an original proceeding in *habeas corpus*. A complaint was filed against the petitioner in the justice

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court of Tonopah township, in words and figures as follows:

"Personally appeared before me, this 1st day of March, A. D. 1916, John Artoocovich, of Tonopah, in the county of Nye, State of Nevada, who, upon information and belief, complains and says that John Murray, of Tonopah, on or about the 10th day of November, A. D. 1915, and before the filing of this complaint, in the town of Tonopah, in said county of Nye, State of Nevada, did then and there unlawfully take and receive of and from John Artoocovich \$10 lawful money of the United States, while employed as a laborer at the Tonopah Extension Mining Company, a corporation, as the price and condition of the continuance in employment of said Artoocovich at said mine as laborer therein, he, the said John Murray, being then and there foreman of said mining company charged and intrusted with the continuance of the said John Artoocovich in the employment of said mining company, all of which is contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the State of Nevada. Said complainant therefore prays that a warrant may be issued for the arrest of the said John Murray, and that he may be dealt with according to law.

"John Artoocovich.

"Subscribed and sworn to before me this 1st day of March, A. D. 1916.

H. Dunseath,

"Justice of the Peace of said Township."

Petitioner was arrested and put on trial in the justice court upon said complaint, before a jury, and upon conviction was fined in the sum of \$300, and sentenced to serve six months in jail. From this judgment he appealed to the district court, where he was tried before a jury and found guilty; and a motion for a new trial, as well as a motion in arrest of judgment, having been denied, judgment was passed by the court, adjudging that petitioner pay a fine of \$300 and serve six months in the county jail.

It is contended by petitioner that neither the justice court nor the district court acquired jurisdiction to hear and determine the charges against him, for the reason

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Opinion of the Court—Coleman, J.

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that the complaint is not in compliance with the fourth amendment to the constitution of the United States, or section 18, article 1, of the constitution of the State of Nevada, or with section 7472 of the Revised Laws of Nevada, in that it is made upon information and belief, instead of upon the positive knowledge of complainant. Counsel for petitioner relies with great confidence upon the case of *Salter v. State*, 2 Okl. Cr. 464, 102 Pac. 719, 25 L. R. A. n. s. 60, 139 Am. St. Rep. 935, to sustain his contention. While it is true that that case does sustain the contention of counsel, the decision was reversed in *Ex Parte Talley*, 4 Okl. Cr. 398, 112 Pac. 36, 31 L. R. A. n. s. 805, where the authorities were reviewed at length. The court said:

"The requirement being that the verification shall be in positive terms, it follows that a verification on information and belief, as were many of those in the cases cited above, so far as a compliance with the law is concerned, is the same as and no better than no verification at all, and leaves the information as vulnerable as though no pretense at verifying it had been made; and therefore, if the information be not void in the first-mentioned case, it is not void in the latter. Also, if the defectiveness of a verification or the total want of one is waived by pleading to the information without moving to quash or set the same aside, then certainly the information cannot be void on that account, nor the court without jurisdiction; for all agree that jurisdictional matters may be raised even for the first time in the appellate court. And every time a court has sustained a conviction based upon an information not verified or defectively verified, it has thereby said that such defect was not jurisdictional. The record before us does not disclose whether the petitioner raised this question below, and, for the purposes of this case, whether he did so or not is immaterial, for if he filed a motion to quash the information and the court overruled the same, the court committed error; but it was only error, and the court had as much jurisdiction after committing the error as it had before. The petitioner's proper remedy was by appeal or writ of error.

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In that way only could the error be corrected. We are aware that in *Salter v. State*, 2 Okl. Cr. 464, 102 Pac. 719, 25 L. R. A. n. s. 60, 139 Am. St. Rep. 935, this court held that such a defect might be raised by a demurrer or an objection to the introducing of evidence, and that an information, verified only on information and belief, is insufficient to support a judgment of conviction. But upon further consideration we now hold that such an information will support a conviction; that the proper and only manner to raise the question of verification is by motion to quash or set aside the information on that ground, and that if no such motion be filed and presented before pleading to the information, the defect is waived. And *Salter v. State*, *supra*, in so far as it is in conflict with this holding, is hereby overruled."

In *Dowdell v. United States*, 221 U. S. 325, 31 Sup. Ct. 590, 55 L. Ed. 753, it is said:

"Objections are made as to want of proper arrest and preliminary examination of the accused before a magistrate, and that the information was not verified by oath or affidavit. If tenable at all, no objections of this character appear to have been made in due season in the court of first instance. Objections of this sort must be taken before pleading the general issue by some proper motion or plea in order to be available to the accused. (1 Bish. Crim. Proc. sec. 730.)"

The objection that the justice of the peace did not acquire jurisdiction for the reasons stated was made for the first time after the case had been appealed to the district court, but it nowhere affirmatively appears that that objection was made prior to arraignment upon the complaint and pleading thereto in the district court.

1. We are of the opinion, from a consideration of the authorities, that the defect complained of is not jurisdictional, and that it was waived by defendant by pleading to the complaint without making an objection upon the grounds assigned in this court. An objection of this kind must be made at the first opportunity.

2. It is suggested that our statute provides that in a

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McCarran, J., concurring

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misdemeanor case which is appealed to the district court the defendant may move to dismiss the case for certain reasons (Rev. Laws, 7517, 7518), and the fact that defendant made such a motion in the district court is of importance in the consideration of this matter. We are unable to see in what way that can affect the situation as it is presented here. If the point were of any consequence at all, the fact that it does not affirmatively appear that such motion was made prior to the arraignment of and pleading by the defendant obviates the necessity of a consideration of the point. It will be presumed that the proceedings in the district court were in every way regular.

It is the order of the court that the proceeding be dismissed.

NORCROSS, C. J.: I concur.

MCCARRAN, J., concurring in the order:

I concur in the order, because I believe that the writ should be denied for other reasons than those set forth in the opinion of Mr. Justice COLEMAN.

Section 7517, Revised Laws, applicable to criminal cases appealed from the justice court to the district court, provides:

"The complaint, on motion of defendant, may be dismissed upon the following grounds:

"1. That the justice did not have jurisdiction of the offense;

"2. That more than one offense is charged therein;

"3. That the facts stated do not constitute a public offense."

Section 7518, Revised Laws, provides:

"If the defendant does not object to the complaint for any of the causes above specified, or if his objections are overruled, he must be required to plead as to an indictment without regard to any plea entered before the justice. In other respects, the proceedings shall be the same as in criminal actions originally commenced in

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McCarran, J., concurring

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the district court, and judgment shall be rendered and carried into effect accordingly."

It appears from the record that after the appeal was perfected to the district court, and before proceeding to trial, the petitioner interposed and filed objections to the complaint under the provisions of sections 7517 and 7518, Revised Laws. In view of this fact, and in the light of the statute as set forth in section 7518 of the Revised Laws, can we safely say that petitioner waived his objection, when in due time in the district court, after appeal to that tribunal, he interposed this objection? I think not.

The case of *Dowdell v. United States*, cited and quoted from in the prevailing opinion, cannot be said to be in point nor an authority in this case, in view of section 7518 of our statute.

In the light of the provisions of our code, the case of *Ex Parte Talley*, 3 Okl. Cr. 398, 112 Pac. 36, 31 L. R. A. n.s. 805, cannot avail to support the conclusions reached in the prevailing opinion. The Supreme Court of Oklahoma, in the Talley case, said:

"The proper and only manner to raise the question of verification is by motion to quash or set aside the information on that ground, and that if no such motion be filed and presented before pleading to the information, the defect is waived."

By the section of our statute quoted above, the right was specifically afforded petitioner to challenge the sufficiency of the complaint in the district court for the first time. Petitioner appears to have availed himself of this right, and interposed his objections under the sections of the statute quoted. Under our constitutional provision, the district court was the court of last resort in this case. Petitioner could not avail himself of the privilege of appeal as suggested in the Talley case.

The prevailing opinion concludes the rights of petitioner here, for the reason that, notwithstanding the fact of his having interposed his objections under section 7518 before proceeding to trial in the district court, he was guilty of



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McCarran, J., concurring

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waiver because he failed to interpose these objections in the justice court. I am unable to see how this conclusion can be arrived at while section 7518 remains a part of our criminal procedure. There was undoubtedly ample reason for the enactment of this statute having to do with criminal cases on appeal from the justice court. A justice of the peace is not required to be, nor is he presumed to be, versed or trained in the law. The legislature, in its wisdom, provided by these statutory enactments that the complaint filed against a party in the justice court might be challenged in the district court, where the challenge was based upon grounds requiring the application of the technical rules and principles of the law. Just as the statute provides that the proceedings in the district court shall be a trial anew, so, in furtherance of that principle, it provides that these certain objections going to the legality of the proceedings might be raised for the first time on appeal in the district court. I fear we are establishing a dangerous precedent when we hold the petitioner guilty of a waiver for not having presented his objections in the justice court. Section 7518 must be given its full force and effect, and its language is plain and unmistakable. Petitioner appears to have availed himself of the provisions of this section. As I view this statute, it was not necessary for these objections to be raised for the first time in the justice court. Petitioner could not, in my judgment, be guilty of a waiver, when he raised his objections under the provisions of this section in the district court on appeal.

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## Argument for Petitioner

[No. 2234]

IN THE MATTER OF THE APPLICATION OF STANLEY  
MOLINO FOR A WRIT OF HABEAS CORPUS.

[157 Pac. 1012]

## 1. CRIMINAL LAW—PRELIMINARY EXAMINATION—EVIDENCE.

It is not required upon preliminary examination, in order to warrant a magistrate in holding the accused to answer, that the evidence taken as a whole be sufficient to warrant a jury in reaching a conclusion of the guilt of the accused beyond a reasonable doubt.

## 2. HABEAS CORPUS—SCOPE OF INQUIRY—EXAMINATION OF WITNESS.

In a *habeas corpus* proceeding, it is not the province of the supreme court to determine to what extent the direct evidence of the witness given before the examining magistrate was weakened or modified by the cross-examination, since that was the province of the examining magistrate.

## 3. CRIMINAL LAW—WEIGHT OF EVIDENCE.

Where testimony of a witness given upon cross-examination modifies, varies, or conflicts with the testimony given upon direct examination, it is the province of the magistrate, the court, or the jury, as the case may be, to determine the truth of the witness's testimony from the entire examination.

## 4. CRIMINAL LAW—PRELIMINARY EXAMINATION—EVIDENCE.

Where it appeared that the accused, charged with assault with a deadly weapon, was carrying a pistol and a belt filled with cartridges for the purpose of protecting himself and certain live stock against a possible attack by rabid coyotes, for the purposes of preliminary examination, the magistrate would be justified in acting upon the probability that the accused would not be carrying an unloaded pistol for such purpose.

ORIGINAL PROCEEDING. Application by Stanley Molino for a writ of *habeas corpus*. Writ denied.

R. M. Hardy, for Petitioner:

The writ should be granted and perpetuated and the petitioner discharged. There is no testimony or other evidence in the record to establish any probability that petitioner committed the crime alleged, or any crime, or that a crime was committed. The cross-examination of the only witness tending to connect petitioner with the alleged crime shows that her statements were merely surmises. The object of cross-examination is to weaken or disprove the case of one's adversary. (40 Cyc. 2477;

*Ferguson v. Rutherford*, 7 Nev. 386; *Jackson v. Feather River W. Co.*, 14 Cal. 18.)

The evidence offered by a witness should be taken as a whole. If his examination in chief tends to establish a fact, and his answers on cross-examination absolutely disprove and deny the possible truth or probability of his original statements of fact, his testimony should be treated as a nullity. (12 Cyc. 983.)

In order to establish reasonable or probable cause in this case, it is necessary to base an inference or conclusion upon another inference or conclusion, or upon a series of them. This is contrary to established rule. (*Chicago R. R. Co. v. Rhoades*, 63 Pac. 59.)

The evidence offered by the defendant in a preliminary hearing is to be given some weight, even though scrutinized according to the rules of evidence. (*Ryan v. Territory*, 100 Pac. 770.)

All the essential elements of the crime must be proven. (Underhill on Criminal Evidence, 354; *State v. Eschbach*, 34 Pac. 179; *State v. Napper*, 6 Nev. 113.)

*Geo. B. Thatcher*, Attorney-General, and *J. A. Sanders*, District Attorney, for Respondent:

A jurisdictional question is not raised by the petition. The statute enumerates the grounds upon which discharge may be had upon *habeas corpus*. (Rev. Laws, 6245.) If the lower court had jurisdiction, you cannot go behind its judgment.

The writ of *habeas corpus* is not intended for the correction of errors or mere irregularities, and cannot be substituted for an appeal or writ of error. (*Ex Parte Talley*, 112 Pac. 36.)

By the Court, NORCROSS, C. J.:

This is an original proceeding in *habeas corpus*. By stipulation of respective counsel the matter was heard upon the petition and the demurrer thereto. The petition alleges that petitioner is unlawfully held and restrained of his liberty by the sheriff of Humboldt County. Upon

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Opinion of the Court—NORCROSS, C. J.

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a commitment of the justice of the peace of Lovelock township, petitioner was held to answer to the crime of an assault with a deadly weapon with intent to do bodily injury to one P. H. Wolf, alleged to have been committed on the 17th day of April, 1916. It is the contention of petitioner that he was held to answer without reasonable or probable cause.

From the petition it appears that prior to the filing of the petition in this court a similar petition was presented to the Sixth judicial district court in and for Humboldt County on the 8th day of May, 1916, and after hearing upon the return to the writ, the application for petitioner's discharge was denied.

It is conceded by counsel for petitioner that the direct testimony of the witness for the state, Mrs. A. M. Anderson, taken alone was sufficient to establish reasonable and probable cause. It is contended, however, that the testimony of this witness was so modified upon cross-examination as to destroy the probative effect of her testimony given upon direct examination.

In *Re Kelly*, 28 Nev. 499, 83 Pac. 226, this court said:

"We are not called upon on this hearing to pass upon the sufficiency of this evidence to warrant the conviction of the defendant, and upon that question express no opinion. In this connection it is proper to observe that a magistrate, in holding a defendant to answer for a crime, is not required to have submitted evidence sufficient to establish the guilt of the person charged beyond a reasonable doubt. As was said in a recent decision (*In Re Mitchell*, 1 Cal. App. 396, 82 Pac. 347): 'In order to hold defendant and put him on his trial, the committing magistrate is not required to find evidence sufficient to warrant a conviction. All that is required is that there be a sufficient legal evidence to make it appear that "a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof."'"

See, also, *In Re Oxley and Mulvaney*, 38 Nev. 385, 149 Pac. 992.

1. The attorney-general in his oral argument upon the hearing of this case stated, in effect, that in his opinion the evidence taken as a whole would not warrant a jury in reaching a conclusion of the guilt of the petitioner beyond a reasonable doubt. However, the correctness of his contention must be conceded that such a degree of proof is not required upon a preliminary examination to warrant the magistrate in holding a defendant to answer. (*In Re Oxley and Mulvaney*, *supra*; *Ex Parte Heacock*, 8 Cal. App. 420, 97 Pac. 77.)

2, 3. While it is said in Cyc.: "The object of cross-examination is to weaken or disprove the case of one's adversary" (40 Cyc. 2477, C)—it is the province of the magistrate to consider the testimony as a whole and to give it such weight as in his judgment he thinks it is entitled to. It was the province of the magistrate and not the province of this court to determine to what extent the direct evidence of the witness was weakened or modified by the cross-examination. We know of no authorities holding, and we have not been cited to any such, as an invariable rule that the testimony of the witness given upon cross-examination must be accepted. Where modifying, varying, or conflicting with the testimony given upon direct examination it is the province of the magistrate, the court, or the jury, as the case may be, to determine the truth of the witness's testimony from the entire examination.

It cannot be said, we think, that the testimony of the witness, Mrs. A. M. Anderson, is not without some corroboration. From the transcript of the proceedings we quote the following from the testimony of the witness Miss McIntyre:

"Q. Miss McIntyre, you do not know who fired that shot, do you? A. I knew that one of the two men did it. I do not know which one."

There was evidence tending to show that petitioner had on his person at the time an automatic pistol, and that his companion was not armed.

4. It is contended that there is no proof that the

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Opinion of the Court—Norcross, C. J.

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pistol carried by petitioner was loaded, and that if not loaded it could not constitute a deadly weapon. It is in proof that the petitioner not only was carrying the pistol, but also a belt filled with cartridges, and that he was going thus armed for the purpose of protecting himself and certain live stock against a possible attack by rabid coyotes. For the purpose of a preliminary examination the magistrate would be justified in acting upon the probability that the petitioner would not be carrying an unloaded pistol for such purpose.

It may be conceded that the evidence taken before the magistrate is far from conclusive, but we cannot say that the evidence as a whole is insufficient to make out a case of reasonable or probable cause. If the district attorney should be convinced that proof cannot be submitted to satisfy a jury of the guilt of the defendant of the crime charged beyond a reasonable doubt, it may be assumed that he will take a course consistent with the duty which he owes both to the state and to the defendant.

The application for the writ is denied.

MCCARRAN, J.: I concur.

COLEMAN, J., did not participate in this case.

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Points decided

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[No. 2135]

**J. P. RAINE, APPELLANT, v. SARAH P. ENNOR,  
BELLE B. ENNOR, AND HERBERT B. ENNOR,  
RESPONDENTS.**

[158 Pac. 133]

**1. APPEAL AND ERROR—REVIEW—PRESUMPTIONS.**

In view of Rev. Laws, 4922, 5356, a judgment of dismissal is sufficient without a recital in the record that a motion to dismiss had been made; the presumption being that everything was done to lay the foundation for a valid judgment of dismissal, whether the making of a motion to dismiss, or something more.

**2. APPEAL AND ERROR—REVIEW—OBJECTIONS NOT MADE BELOW.**

On appeal from a judgment dismissing a suit for want of prosecution, the supreme court cannot consider the matter whether no motion to dismiss was made or argued in the trial court; counsel for plaintiff should have moved to vacate the order of dismissal for that reason, offered evidence in support thereof, and, if the court refused to vacate the order, the supreme court could have considered the question on appeal.

**3. DISMISSAL AND NONSUIT—WANT OF PROSECUTION—DISCRETION OF TRIAL COURT.**

Where a complaint was filed April 9, 1904, defendants brought and filed demurrers May 20, 1904, and nothing more was done in the case until June, 1913, judgment dismissing the suit for want of prosecution, plaintiff making no offer to show excusable neglect, was not an abuse of discretion on the part of the trial court.

**4. DISMISSAL AND NONSUIT—MOTION TO DISMISS—BURDEN TO EXCUSE NEGLIGENCE IN PROSECUTION.**

When a motion to dismiss for want of prosecution is made in a case in which no step has been taken by plaintiff for several years, the duty rests upon him to excuse his neglect.

**5. DISMISSAL AND NONSUIT—WANT OF PROSECUTION—OBTAINING INJUNCTION.**

The fact that plaintiff obtained an injunction in his suit against defendants is of no importance on appeal from a judgment dismissing the suit for want of prosecution, since the obtaining of an injunction is not a move in the prosecution of a suit tending to bring it to issue or trial.

**6. APPEAL AND ERROR—BRIEFS—ANIMADVERSIONS UPON OPPOSING COUNSEL.**

Where statements in the reply brief of counsel for appellant reflecting upon the professional conduct of counsel for respondent are not warranted by anything appearing in the record, they are improper and will be directed to be expunged.

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Argument for Respondents

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APPEAL from Third Judicial District Court, Eureka County; *Thomas F. Moran*, Judge.

Suit by J. P. Raine against Sarah P. Ennor and others. From a judgment dismissing the suit for want of prosecution, plaintiff appeals. **Judgment affirmed.**

*Mack & Green*, for Appellant:

The order dismissing the action should be set aside and the cause reinstated upon the calendar of the lower court. The court erred in dismissing the complaint for laches, for the reason that no motion to dismiss was ever made. The order was made without any authority, without any law to sustain it, without any hearing being given plaintiff on the motion to dismiss, and the record shows that no laches could be attributed to plaintiff in the matter. No statute or rule of practice authorizes the court, of its own motion, without notice, by rule or otherwise, and without the consent of the parties, to arbitrarily dismiss a pending cause of action at issue. (*Teller v. Sievers*, 77 Pac. 261; *Berggren v. Berggren*, 40 N. W. 284; *Hill v. Weber*, 15 N. W. 52; Rule X, District Court Nevada; *Shaw v. Railway Co.*, 32 N. J. Law, 293; *Pocuin v. American Sugar R. Co.*, 130 N. Y. Supp. 162; *Delauney v. Herman*, 7 Fed. Cas. No. 3757.)

*J. W. Dorsey*, for Respondents:

The judgment of the lower court should be affirmed. The record discloses on the part of appellant inattention and indifference, which constitute inexcusable laches, precluding a court of equity from granting the relief sought, independently of any other question in the cause. "Equity abhors a stale claim." (*Truett v. Onderdonk*, 120 Cal. 581, 589; *Johnson v. Railroad Co.*, 18 Fed. 821.)

The rule that equity will discourage a stale demand is "peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original



## Argument for Respondents

transaction having become so obscure by time as to render the ascertainment of the exact facts impossible." (*Burling v. Newlands*, 112 Cal. 476, 502-3; *Hammond v. Hopkins*, 143 U. S. 250; *Bell v. Hudson*, 73 Cal. 285, 288-9; *Barnes v. Taylor*, 27 N. J. Eq. 259, 261-2; *German American Seminary v. Kiefer*, 43 Mich. 105, 111; *Mooers v. White*, 6 Jones Ch. 360, 372-3; *Teall v. Slaven*, 40 Fed. 777, 781-2; *Dugan v. O'Donnell*, 68 Fed. 777, 781-2; *Hoff v. Jenney*, 54 Mich. 510, 20 N. W. 563; *Lant v. Manley*, 71 Fed. 19.)

An action should be dismissed for the failure of the plaintiff to prosecute it with due diligence, unless he can present a reasonable excuse for his failure to prosecute. This power exists independently of statute or rule of court. (14 Cyc. 443; *Mannion v. Steffens*, 113 N. Y. Supp. 1018; *Notman v. Guffey Co.*, 128 N. Y. Supp. 20; *Holtzoff v. D. & O. Co.*, 119 N. Y. Supp. 47; *Oehlhof v. Solomon*, 120 N. Y. Supp. 925; *Langford v. Murphey*, 70 Pac. 1112; *Bank v. Hunt*, 82 Pac. 285; *Saville v. Frisbie*, 70 Cal. 87; *Hassey v. Homestead Assn.*, 102 Cal. 611; *Fleischman v. Menges*, 113 N. Y. Supp. 515; *Kubli v. Hawkett*, 89 Cal. 638.)

A defendant who does not present a cross-action with a prayer for affirmative relief need not give any attention to the cause with a view of forcing a trial, but he may remain passive, and he may rely upon plaintiff's failure to prosecute as a discontinuance of the action. (*Crosby v. Di Palma*, 141 S. W. 321; *McLaughlin v. Clausen*, 116 Cal. 487; *Kriess v. Hotaling*, 99 Cal. 383; *First National Bank v. Nason*, 115 Cal. 626; *Chipman v. Hibberd*, 47 Cal. 638; *Witter v. Phelps*, 163 Cal. 655; *Mowry v. Weisenborn*, 137 Cal. 110; *Gray v. Times Mirror Co.*, 104 Pac. 481; *Smith v. Carter*, 122 N. W. 1035; *Cone v. Jackson*, 55 Pac. 941.)

It cannot be objected that no notice of a motion was given, if counsel for each of the parties was present at the hearing of the motion and contested the same. (*Acock v. Halsey*, 90 Cal. 215; *Des Moines Union Ry.*

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Opinion of the Court—Coleman, J.

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v. *District Court*, 153 N. W. 217.) It is presumed that the doings of a court of record are legal and proper, that its jurisdiction was properly acquired, that its proceedings are legal and valid, and that its decisions are well founded and free from error. (1 Black on Judgments, 404.) Presumptions in favor of the jurisdiction of superior courts is most frequently invoked in aid of the judgments in cases where the record is silent on the subject of the matter determined. (*Brown v. Vidal*, 1 Cal. Unrep. 15.)

By the Court, COLEMAN, J.:

This is an appeal from a judgment dismissing a suit for want of prosecution. The complaint was filed April 9, 1904. The defendants appeared, and filed demurrers to the complaint on May 20, 1904. Nothing more was done in the case until June, 1913, when plaintiff obtained an injunction. The suit was instituted in the district court of Eureka County. On October 9, 1913, the Honorable Peter Breen, the district judge of that county, entered an order that the Honorable Thos. F. Moran, judge of the Second judicial district, "hear and decide all matters and things connected with or involved in the case."

Section 5356, Rev. Laws, relative to transcripts on appeal from the district court to the supreme court, provides, *inter alia*, that:

"If any written opinion be placed on file \* \* \* in the court below [district court], a copy shall be furnished, certified in like manner."

Judge Moran filed a written opinion in the case on March 6, 1914, ordering the suit dismissed.

Appellant contends that no motion to dismiss the action was either made or argued before Judge Moran, and that the action of the court in dismissing the case is absolutely null and void. There is no written motion or notice of motion to dismiss in the record, or anything to indicate that there was such a motion made, except as appears in the written opinion of Judge Moran, filed

March 6, 1914, which is part of the transcript on appeal. In his opinion Judge Moran says:

"There was no order made transferring this case to Washoe County, and by stipulation of the parties demurrer and motion to dismiss for laches were argued by the respective parties at the courthouse in Reno."

Again he says:

"As to the motion to dismiss, a more serious question is involved. \* \* \*"

In conclusion he says:

"For the reasons stated, the motion to dismiss on the ground of laches or failure to prosecute the suit is granted, and the action is hereby dismissed."

By section 4922, Rev. Laws, it is provided:

"\* \* \* The decision in an action or proceeding may be written or signed at any place in the state, by the judge who acted on the trial and may be forwarded to, and filed by the clerk, who shall thereupon enter judgment as directed to in the decision. \* \* \*"

Pursuant to the section just quoted, the clerk of the district court of Eureka County, on May 23, 1914, after Judge Moran's opinion had been filed, entered up the following in the judgment book:

"This cause came on regularly for argument on demurrer on the 5th day of November, 1913, C. E. Mack, Esq., appearing as counsel for plaintiff, and J. W. Dorsey, Esq., appearing as counsel for defendants. An argument on the demurrer interposed by the defendants was argued and submitted to the court, and the court took it under advisement, and on the 28th day of February, 1914, made an order directing that the action and the complaint be dismissed for laches. Wherefore, by reason of the law and the order aforesaid it is ordered, adjudged, and decreed that said action is hereby dismissed."

The judgment order just quoted was apparently prepared by Messrs. Mack and Green, who were attorneys for plaintiff in the court below, as well as on this appeal, as their names are indorsed thereon. Thereafter, and

on June 5, 1914, Judge Moran signed a formal judgment, which was filed June 11, 1914, which recited the making by defendant of a motion to dismiss for want of prosecution, that argument was heard thereon, and a finding of lack of diligence on the part of plaintiff in the prosecution of the action and a judgment of dismissal for want of prosecution.

Counsel for appellant say in their brief that the judge had no authority to render or sign said judgment, as the court had exhausted its authority when the decision was filed on March 6. Let that be as it may, we do not think a consideration of it at all necessary in the determination of the appeal.

It is strenuously urged by counsel for appellant that no motion to dismiss was made in the lower court, and that consequently the order of dismissal is void. While the judgment entered by the clerk does not recite that a motion to dismiss was made, it does say that the court made an order directing that the action and the complaint be dismissed for laches.

1. The opinion of the trial judge at three separate places alludes to the motion to dismiss. Even if this fact is of no importance in the determination of the question before us, it seems that the judgment of dismissal is sufficient without a recital that a motion to dismiss had been made. Black on Judgments, 2d ed. p. 404, sec. 270, says:

“There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done until the contrary appears. This rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged.’ Hence, jurisdiction having been once acquired over the

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Opinion of the Court—Coleman, J.

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parties and the subject-matter, every presumption is in favor of the legality of the judgment."

This court, in *Blasdel v. Kean*, 8 Nev. at page 308, says:

"But every legal intendment is in favor of the validity of the judgment, and the presumption arises that other evidence was introduced which established the sufficiency of service of summons to the satisfaction of the district judge."

So in the case at bar, where the record is silent, there is a presumption that everything was done to lay the foundation for a valid judgment of dismissal, whether the making of a motion to dismiss, or something more.

2. Counsel for appellant in their reply brief stated what purported to be facts to show that no motion to dismiss was either made or argued in the lower court. This is not a matter which we can consider on this appeal. If they had been of the opinion that there had been no such motion or argument in the district court, and that the lower court had erroneously assumed that there had been, they could have made a motion to vacate the order of dismissal for that reason, and offered evidence in support thereof, and, in case of the refusal of the court to vacate the order, we could on appeal consider the question.

3, 4. It is further urged that the court abused its discretion in dismissing the action. It is almost universally held that, where the plaintiff fails to prosecute his action with due diligence, it should be dismissed, unless he shows a reasonable excuse for his nonaction. So far as the record shows, no excuse whatever was offered by plaintiff for not having prosecuted the action.

"It is the inherent right of the courts, and therefore one existing independently of any statute, to dismiss a suit for failure to prosecute it with due diligence." (9 R. C. L. p. 206.)

"An action may be dismissed or a nonsuit granted for the failure of plaintiff to prosecute it with due diligence,

unless he presents some sufficient excuse for failure to prosecute. This power exists, independent of statute or of rule of court." (14 Cyc. 443, citing a great array of authorities.)

The facts in *Langford v. Murphey*, 30 Wash. 499, 70 Pac. 1112, were similar to those in this case. There the defendant demurred to the complaint, but the demurrer was not heard, and nothing further was done for nearly seven years, when the plaintiff moved to strike the demurrer from the files, and the defendant moved to dismiss for want of prosecution. The motion to dismiss was granted. It was held, on appeal, that the case was properly dismissed.

In *First National Bank v. Hunt*, 40 Wash. 190, 82 Pac. 285, it is said:

" \* \* \* It will thus be seen that, after the action had been brought and an issue of law raised upon the pleadings, it was allowed to remain dormant for nearly three and a half years. This fact of itself is *prima facie* sufficient to show an abandonment of the action."

In *Streicher v. Murray*, 36 Mont. at page 59, 92 Pac. at page 40, it is said:

"The mere bringing of an action does not relieve a person from the imputation of laches. The lack of diligence in prosecuting it after it is brought leads to the same consequences as delay in bringing it. Witnesses die or disappear, or the facts fade from memory. The positions of the parties change, or the subject of the controversy fluctuates in value. The right sought to be enforced becomes doubtful or uncertain, or it becomes impossible for the court to administer equity between the parties with any degree of certainty. In all such cases the court will, in its discretion, refuse to entertain the action and leave the parties as they are. (*Johnston v. Standard M. Co.*, 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480; *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531; 18 Am. & Eng. Ency. Law, 2d ed. 110, and collection of cases in note.) Each case must rest upon its own facts, but we think the excuse offered

for the delay in bringing the action, and then allowing it to rest without prosecution for more than nine years, is not justified by the reasons assigned either in the pleading or in the evidence. Indeed, the evidence fails to offer any substantial reason why the trial was not had sooner."

In *Just v. Idaho C. & I Co.*, 16 Idaho, at page 653, 102 Pac. at page 385, 133 Am. St. Rep. 140, the court uses the following language:

"The appellants further contend that the complaint fails to show that the respondents have acted with diligence, and that, on the contrary, no reason being given for the delay, the complaint upon its face shows the respondents guilty of laches and negligence in prosecuting their action. Appellants cite a great many authorities in which it has in effect been held: 'That, independently of any statutes of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. \* \* \* Laches and negligence are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in equity.' This statement of the rule is supported by the \* \* \* authorities."

The case of *Kubli v. Hawzett*, 89 Cal. 638, 27 Pac. 57, is one in which a motion to dismiss was sustained. The demurrer to the complaint had been on file for over three years without having been brought to a hearing, and the affidavits filed by the parties were conflicting. It was held not an abuse of discretion to dismiss the action.

In *Stith v. Jones*, 119 N. C. 428, 25 S. E. 1022, it was held that it was inexcusable neglect where no steps were taken to prosecute the action for four and a half years.

See, also, *Mowry v. Weisenborn*, 137 Cal. 110, 69 Pac. 971; *Gray v. Times Mirror Co.*, 11 Cal. App. 155, 104 Pac. 481; *Smith v. Carter*, 141 Wis. 181, 122 N.W. 1035; *Crosby v. Di Palma* (Tex. Civ. App.) 141 S. W. 321; *Colorado E. Ry. Co. v. U. P. Ry. Co.*, 94 Fed. 312, 36 C. C. A. 263.

In *Cone v. Jackson*, 12 Colo. App. 463, 55 Pac. 942, it is said:

"Motions of this character [to dismiss for want of prosecution] are addressed to the sound discretion of the trial court, and, unless it manifestly appears that there has been an abuse of discretion, or that it has been arbitrarily exercised, this court cannot interfere."

By the great weight of authority, when a motion to dismiss for want of prosecution is made in a case in which no step has been taken by the plaintiff for several years, the duty rests upon him to show excusable neglect. The record in this case does not show that any offer was made by plaintiff to show excusable neglect for failure to prosecute the action. The court did not abuse its discretion in dismissing the action.

5. The fact that appellant obtained an injunction against respondents in June, 1913, is of no importance upon this hearing. The obtaining of an injunction is not a move in the prosecution of a suit which tends to bring it to issue or trial.

6. The reply brief of counsel for appellant contains certain statements reflecting upon the professional conduct of counsel for respondent in the case. Such statements are not warranted by anything which appears in the record, are improper, and are directed to be expunged.

The judgment appealed from is affirmed.

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**REPORTS OF CASES**  
**DETERMINED IN**  
**THE SUPREME COURT**  
**OF THE**  
**STATE OF NEVADA**

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**JULY TERM, 1916**

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[No. 2195]

**JIM BUTLER TONOPAH MINING COMPANY (A CORPORATION), APPELLANT, v. WEST END CONSOLIDATED MINING COMPANY (A CORPORATION), RESPONDENT.**

[158 Pac. 876]

**1. MINES AND MINERALS—EXTRALATERAL RIGHTS—END LINES.**

As regards extralateral rights under Rev. Stats. U. S. 2322 (U. S. Comp. Stats. 1913, 4618), where a patented mining location is in the form of a parallelogram, except for the exclusion, for conflict, of a triangular piece at a corner, the remainder of what would have been the end line but for such exclusion is the end line; the interior line of the excluded triangle being one, or a part of one, of the side lines, and not part of a broken end line.

**2. MINES AND MINERALS—EXTRALATERAL RIGHTS—OPPOSITE DIRECTIONS.**

Rev. Stats. U. S. 2322, limiting extralateral rights to the part of a vein between vertical planes drawn downward through the end lines, continued "in their own direction," does not negative extralateral rights in opposite directions; the end lines having two directions.

**3. MINES AND MINERALS—EXTRALATERAL RIGHTS—ANTICLINAL FOLD VEIN—"APEX."**

Within Rev. Stats. U. S. 2322, giving extralateral rights as to veins the tops or apexes of which are within the surface lines of the located claim, the crest of a vein in the form of anticlinal fold is the apex; a terminal edge not being necessary for an apex.

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Statement of Facts

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APPEAL from the Fifth Judicial District Court, Nye County, *Mark R. Averill*, Judge.

Action by the Jim Butler Tonopah Mining Company against the West End Consolidated Mining Company. Judgment for defendant, and plaintiff appeals. **Affirmed.** [On writ of error to United States Supreme Court.]

STATEMENT OF FACTS

This is an action brought by the appellant, the Jim Butler Tonopah Mining Company, against the respondent, the West End Consolidated Mining Company, to recover damages for ore extracted by the respondent and situated vertically beneath the surface of the Eureka and Curtis lode mining claims owned by appellant, and also for an injunction restraining the defendant from committing further trespass. The respondent owns the adjoining West End lode mining claim, and asserts the right to mine extralaterally on the vein and ore bodies in dispute by virtue of the ownership of this claim, which it contends embraces the apex of the vein, so situated with reference to the boundaries of the claim that it can avail itself of the extralateral grant contained in the federal mining statutes. The court found, among other facts, the following:

"That there is a vein or lode of rock in place, which, at its top or apex, and on its course or strike, crosses the easterly end line of said West End mining claim 130 to 140 feet northerly from the southeasterly corner of said mining claim, and thence, at its top or apex, and on its course or strike, continues westerly in said mining claim between the side lines thereof to a point on the northerly side line of said claim 1,142½ feet westerly from the northeast corner of said claim, at which point the said vein, at its top or apex, and on its course or strike, departs from said mining claim, crossing said northerly side line. That said vein dips southerly, and in its downward course so far departs from the perpendicular as to pass beyond the southerly side line of said West End

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Statement of Facts

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mining claim, extended downward vertically, and thence into and beneath the surface of the said Eureka lode mining claim and the said Curtis lode mining claim of the plaintiff company.

"The said vein does not on its upward course, or at its top or apex, outcrop or reach the present surface, but is covered or buried to a considerable depth by lava, locally known as and called 'Midway' andesite, which, after the formation of the vein, flowed over the then surface of the territory in which the vein exists; that at and for a distance of 360 feet westerly from where said vein or lode crosses the easterly end line of said West End claim, which crossing is at a distance of 135 feet northerly from the southeast corner of said West End claim, there is a juncture, or union, between two limbs or sides of said vein, and from the summit of said juncture, or union, the downward course of one limb or side thereof is in a northerly direction, and the downward course of the other limb or side thereof is in a southerly direction; that there is a continuation upward from the summit of said juncture, or union, of said northerly and southerly dipping limbs or sides of said vein of ore and silver-bearing quartz or rock in place for a distance from 20 or 30 to more than 100 feet, and to what was the surface before the same was buried beneath the said lava flow; that such ore and silver-bearing quartz were deposited where the same are now found at the same time and during the same period that the main vein below was created, and from mineral-bearing solutions having the same source; that the dip is fairly conformable, and strike, or course, of such upward continuation of ore and silver-bearing quartz is conformable to the dip and strike, or course, of said northerly dipping limb or side of said vein from the summit of said juncture downward, and the court finds that said upward continuation is a part of said vein or lode; that thence westerly, and for a distance of 360 feet, the northerly and southerly dipping limbs, sides, or slopes of said vein do not unite or form

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Statement of Facts

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a union, or juncture, in their upward course, but for that distance each of said limbs or sides has a separate and independent top or apex; that thence westerly, for a distance of 40 feet, the northerly and southerly dipping limbs, sides, or slopes of said vein are again found in conjunction as in the said most easterly 360 feet; that thence westerly, and until said northerly and southerly dipping limbs, sides, or slopes of said vein intersect with and cross said northerly side line of said mining claim, they do not unite or form a union or juncture in their upward course, but for that distance each of said limbs or sides has a separate and independent top or apex; that between said distance of 40 feet, where said northerly and southerly dipping limbs, sides, or slopes of said vein, as aforesaid, unite or form a union or juncture in their course upward, and said points on said northerly side line of said mining claim, where, as aforesaid, said contra dipping limbs, sides, or slopes of said vein respectively intersect said side line and cross the same, and so depart from said mining claim, there are two points at which it appears that said contra dipping limbs, sides, or slopes of said vein on their upward course approach closely to a juncture or union, but as to said contra dipping limbs, sides, or slopes of said vein at said two points, actually forming a juncture or union on their upward course, the evidence is meager and unsatisfactory; that the point where the said northerly dipping limb or side of said vein departs from the said mining claim through the northerly side line thereof is 1,120 feet westerly from the northeast corner of said claim, measured along the northerly side line thereof; that the point where said southerly dipping limb or side of said vein departs from said mining claim through the northerly side line thereof is 1,142½ feet westerly from the northeast corner of said claim, measured along the northerly side line thereof; that throughout said distance of 40 feet, where the contra dipping limbs or sides of said vein are found in conjunction, as hereinbefore stated,

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there is a continuation upward from the summit of the juncture or union of said two limbs or sides of said vein of ore or vein quartz to what was the surface before the same was covered by the lava flow; that the dip or downward course of both the northerly and southerly dipping sides or limbs of the vein where the two are found in conjunction, as aforesaid, and also in the places where each, as aforesaid, has its separate and independent top or apex, is regular, and practically free from undulations; that the said southerly dipping limb or side of the vein in the easterly portion of the West End claim, that is to say, the easterly 360 feet thereof, has been developed from the top or summit of said juncture of said contra dipping limbs to and beyond the southerly side line of said claim, or for a distance, measured on the slope or downward course of said southerly dipping limb or side, of 800 feet or thereabouts, the average dip there being 17 degrees from the horizontal; that the westerly portion, that is to say, the westerly 300 feet of said southerly dipping limb or side of said vein found in the West End claim, has been developed from its top to and beyond the southerly side line of said claim, or for a distance, measured on its slope or downward course, of 1,000 feet or thereabouts, the average dip there being 30 degrees from the horizontal; that the average dip of said northerly dipping limb or side of said vein, so far as the same has been developed in its downward course, is 17 degrees from the horizontal; that said vein is a fissure vein; that there is a difference in the strikes or courses of said northerly and southerly dipping limbs of said vein of about 40 degrees; that at said places and throughout said distances, where said contra dipping limbs of said vein are found to intersect and form a juncture, as aforesaid, there has been a mingling of the mineralizations of said two limbs of said vein within the angle beneath the juncture of the said two limbs; that at such places and throughout said distances the footwall of said two limbs of said vein, within the angle beneath their said juncture, by the process

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of replacement has been converted into mineralized quartz for considerable distances below said juncture, said replacement quartz extending from limb to limb."

Appellant bases its appeal from the decision of the trial court on the following grounds:

*"A. Erroneous Findings of Fact*

"(1) That the finding of the trial court that the two sides of northerly and southerly dipping slopes of the single vein involved are not united at the crest of the anticlinal roll, but are separated for considerable distances within the West End claim, thus forming separate terminal edges along the upper edges of each of these stopes, is unsupported by the evidence.

"(2) That the finding of the trial court, giving the occurrences of quartz in the 'A' series of raises the dignity of a vein, is not justified by the evidence, and, further, that no matter what may be its character, it admittedly dips to the north and has no bearing on a claimed extralateral right extending to the south.

*"B. Errors of Law*

"(1) The trial court found that the discovery in the West End claim was on the northerly dipping portion or slope of the vein, and in spite of this finding awarded an extralateral right to appellee on the southerly dipping limb or slope of the vein. Appellant contends that this is an erroneous construction of the federal statute granting the right to follow a vein extralaterally, and that extralateral rights in two opposite directions, attaching to the same mining claim and the same vein, are not contemplated by this statute.

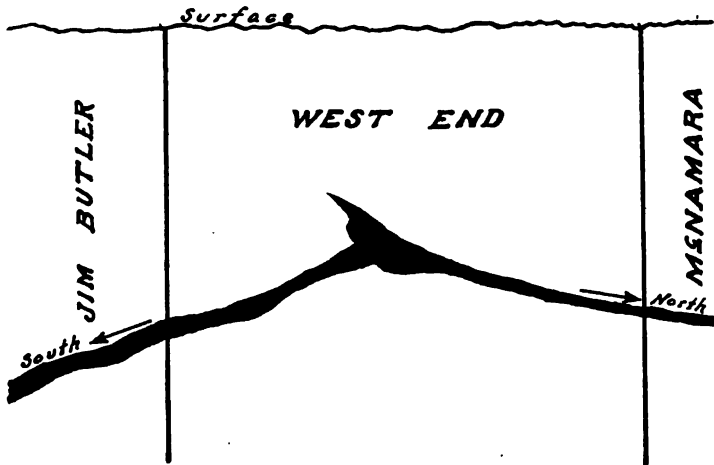
"(2) The trial court found that the northerly and southerly dipping limbs or sides of the vein were united and joined at the crest of the roll for a considerable distance within the West End claim. Appellant contends that the court should have denied the appellee the right to follow the vein extralaterally where such a condition exists, and that no extralateral right whatsoever attaches to an anticlinal occurrence in a vein, since the latter does

## Argument for Appellant

not constitute an apex within the meaning of the federal mining statute.

"(3) The westerly end line of the West End claim is a broken line. Appellant contends that no extralateral right whatsoever may be exercised under such circumstances, since such right attaches only to mining claims possessing straight end lines."

The following diagram represents a cross-section of the vein where the two limbs have been shown by development work to be united at the crest of the anticlinal fold:



*Curtis H. Lindley, Wm. E. Colby, Hugh H. Brown, and J. H. Evans, for Appellant:*

The judgment of the lower court should be reversed.

Section 2322, U. S. Revised Statutes, does not justify the exercise of an extralateral right on the same vein on two downward courses and in opposite directions, since the wording of the statute will not permit of such a construction. This is especially true where the limb of the vein on which the discovery was made dips in the opposite direction from its limb in which the disputed ore bodies occur.

One of the essential elements of an apex is that it shall have a terminal edge, and that when the vein turns over

and dips in an opposite direction, the resulting anticlinal roll has no legal apex, as is held by all the authorities that have considered the question.

The westerly end line of the West End claim is a broken line, which is in contravention of the mandatory provision of the statute requiring end lines to be parallel and necessarily straight.

Section 2322 of the Revised Statutes does not contemplate the exercise of an extralateral right in two opposite directions. The question is squarely raised as to whether two extralateral rights can be predicated on the same location and exercised on the same vein in opposite directions. The vital part of the grant involved is contained in the language which confines the extralateral segments of the vein "to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in *their own direction* that such planes will intersect such exterior parts of such veins or ledges." This language admits only of the interpretation that such planes shall be extended in one direction, and that would be in the direction of the dip of the vein on which the discovery was made. The courts have held that a claimant may follow his vein on its downward course through an end line when the apex of the vein crosses parallel side lines. (*King v. Amy D. Silversmith M. Co.*, 152 U. S. 222; *Bunker Hill-Last Chance Cases*, 131 Fed. 579, 591.)

While ordinarily the term "claim" is synonymous with "location," and they are frequently used interchangeably, the term "claim" may embrace more than one location, and frequently a consolidation of mining locations held and worked under one ownership is held to constitute and be properly designated as a "claim." (*Del Monte M. Co. v. Last Chance M. Co.*, 171 U. S. 55, 74.) Section 2322 of the Revised Statutes does not refer exclusively to the extralateral rights pertaining to a single location, and the idea of extralateral rights arising out of a number of consolidated locations was within the contemplation of Congress when said statute was adopted. (*Carson City M.*



## Argument for Appellant

*Co. v. North Star M. Co.*, 83 Fed. 658; *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 648; *McFeters v. Pierson*, 24 Pac. 1076; *N. P. R. R. Co. v. Sanders*, 49 Fed. 129, 135; *In Re Mackie*, 5 L. D. 199; *Tredinnick v. Red Cloud M. Co.*, 13 Pac. 152; *Malone v. Big Flat G. M. Co.*, 50 Pac. 378; *Salt Lake Co. v. Chainman M. Co.*, 137 Fed. 632, 642; *Phillips v. Salmon River M. & D. Co.*, 72 Pac. 886; *Thompson v. Wise Boy M. & M. Co.*, 74 Pac. 958; *Idaho M. Co. v. Davis*, 123 Fed. 396, 399.)

Prior to the act of 1872, and under the local rules and customs, the miner was entitled to but one vein. While end lines were not specifically mentioned in the statute of 1866, they were implied. (*Eureka Case*, 4 Sawy. 302, 323; Fed. Cas. No. 4548.) The right to follow the one vein was in the direction of its downward course. This established planes beyond which the miner could not go. Under the act of 1866, the lode was the principal thing, and the surface was in reality an incident. (*Johnson v. Parks*, 10 Cal. 447; *Patterson v. Hitchcock*, 3 Colo. 113; *Walrath v. Champion M. Co.*, 63 Fed. 553.) Where the claim was included within a defined surface, this surface could not be invaded for the purpose of searching for other lodes. (*Atkins v. Hendree*, 1 Idaho, 107.) After patent which conveyed but the one lode, the patentee would acquire title to all subsequently discovered veins to the extent that they might be found within the vertical boundaries of his claim. This is the rule applied to placers in cases of lodes or veins discovered subsequent to the application for patent. While the law did not contemplate that any lodes existed, yet, where they were unknown at the time of the application for patent, they passed by operation of law to the placer patentee to the extent they might be found within the vertical placer boundaries. Under the act of 1872, the vein is still the principal thing, in that it is for the sake of the vein that the location is made. (*St. Louis M. Co. v. Montana M. Co.*, 194 U. S. 235, 238; *Del Monte M. Co. v. Last Chance*, 171 U. S. 55, 75.)

The discovery of the vein has always been essential,

## Argument for Appellant

and it is contemplated that this should be disclosed in the discovery shaft, and the direction of its course and dip ascertained. When this is done a plane is established on the discovery vein in the direction of the dip. The courts, when dealing with secondary veins, have announced the rule that when the end-line planes of a mining location are once fixed they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location. (*Walrath v. Champion M. Co.*, 63 Fed. 552, 557.)

In construing section 2322, Revised Statutes, it must be borne in mind that statutes are always to receive the most reasonable and sensible construction possible, so as to avoid injustice and hardship, injury and absurd conclusions, and conform to dictates of natural reason. (*Heydenfeldt v. Daney Co.*, 93 U. S. 634, 638; *Law Our Bew v. U. S.*, 144 U. S. 47, 59; *In Re Chapman*, 166 U. S. 661, 669; *Scottish Insurance Co. v. Bowland*, 196 U. S. 611, 629; *Jacobson v. Massachusetts*, 197 U. S. 11, 39; *Low Haw Suey v. Backus*, 225 U. S. 460, 475.)

The broken end line of the West End claim prevents the exercise of any extralateral right. It is in direct contravention of the statute. "The end lines of each claim shall be parallel to each other." (U. S. Rev. Stats. sec. 2320.) The extralateral right shall be confined by "vertical planes drawn downward through the end lines of their locations." (U. S. Rev. Stats. sec. 2322; *Del Monte M. Co. v. Last Chance M. Co.*, 171 U. S. 55, 84.) The law requiring strict parallelism of end lines is mandatory, so that if a locator sees fit to disobey its explicit terms and accept a patent calling for a broken end line, he must suffer the penalty and lose his right to pursue the vein extralaterally. (*Daggett v. City of Yreka M. T. M. Co.*, 149 Cal. 357, 86 Pac. 968; *Central Eureka Co. v. E. Central Eureka Co.*, 146 Cal. 147; *Walrath v. Champion M. Co.*, 171 U. S. 293; *Belligerent and Other Lode Mining Claims*, 35 L. D. 22; *Pilot Hill and Other Lodes*, 35 L. D. 592.)

The crest or axis of an anticlinal roll in a vein is not

## Argument for Appellant

its top or apex within the meaning of the mining laws. The element of terminal edge is a part of the legal definition of the term "apex." (Costigan on Mining Laws, 139, 140.) Mere proximity to the surface is insufficient to establish the apex. (Barringer and Adams, The Law of Mines and Mining, 442; Shamel, Mining, Mineral and Geological Law, 193, 197; Mines and Minerals, 27 Cyc. 527; Raymond, Glossary of Mining and Metallurgical Terms, Trans. Am. Inst. M. E., vol. IX, p. 102; *Duggan v. Davey*, 4 Dak. 110, 26 N. W. 887; *Illinois S. M. Co. v. Raff*, 34 Pac. 544; *Stevens v. Williams*, Fed. Cas. No. 13413, p. 40, 43; *Iron S. M. Co. v. Murphy*, 3 Fed. 368, 375-76; *Stewart M. Co. v. Ontario M. Co.*, 35 Sup. Ct. Rep., 610, 614-15.)

The finding that the two sides or slopes of the vein are separated for a portion of their extent and have separate tops or apices is unsupported by the evidence, as is the finding that there is an upward extension of vein from the crest or axis of the anticlinal roll. The burden of proof was upon the respondent. This situation was recognized in the lower court, and the case was tried as if defendant had been the plaintiff in the action and asserting its extralateral right affirmatively. When an outside apex proprietor is found mining underneath the surface of another's land, he is called upon to justify his presence underneath such surface; and in doing so he must show by a preponderance of evidence that he is following the vein, the apex of which is so situated within the boundaries as to confer an extralateral right to the extent at least of the alleged trespass. This flows from the *prima facie* presumption derived from the common law that he who owns the surface owns everything within its vertical boundaries, and that an outside apex proprietor is called upon to introduce sufficient evidence to rebut that presumption. (*Con. Wyoming v. Champion*, 63 Fed. 540, 550; *Leadville M. Co. v. Fitzgerald*, 4 Morr. Min. Rep. 380, 389; Fed. Cas. No. 8158; *Heinze v. Boston & M. Consol.*, 30 Mont. 484, 77 Pac. 421, 423; *Jones v. Prospect Mt. T.*

## Argument for Respondent

Co., 21 Nev. 339, 349; *Cheeseman v. Hart*, 42 Fed. 98, 105; *Keely v. Ophir Hill C. M. Co.*, 169 Fed. 601, 603; *Grand Central M. Co. v. Mammoth M. Co.*, 83 Pac. 648, 667.)

*Peck, Bunker & Cole; Cheney, Downer, Price & Hawkins; H. H. Atkinson, and Dickson, Ellis, Ellis & Schulder*, for Respondent:

The appeal is without merit, and the decree of the court below should be affirmed.

He who, by his labor and enterprise, brings into circulation the hidden treasures of the earth is entitled to his reward. The wealth which he thus acquires injures no one, but on the contrary promotes the prosperity of all. Hence, it has been the policy of every intelligent nation, in one way or another, to reward those who discover and develop its mineral wealth. (2 Lindley on Mines, sec. 335; *Lawson v. United States M. Co.*, 207 U. S. 1, 52 L. Ed. 75.)

Questions of doubtful construction are not to be resolved against one who seeks to pursue his vein extralaterally beneath the surface of his neighbor's territory. (2 Lindley on Mines, secs. 583, 584; 3 Lindley, sec. 866; *Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co.*, 5 Utah, 3, 54; *Lawson v. United States M. Co.*, 207 U. S. 1, 13; *Empire State-Idaho M. & D. Co. v. Bunker Hill S. M. & C. Co.*, 114 Fed. 417.)

The owner is entitled to follow his vein extralaterally between planes, one drawn through the end line, and the other parallel thereto, through the point on the side line where the vein leaves the claim. (*Del Monte M. Co. v. New York & L. C. M. Co.*, 66 Fed. 212; *Fitzgerald v. Clark*, 42 Pac. 573, 43 L. Ed. 72, 87; *Ajax G. M. Co. v. Hilkey*, 72 Pac. 447; *Work M. & M. Co. v. Doctor Jack Pot M. Co.*, 194 Fed. 620.)

There is no equity to be subserved by denying the defendant any extralateral right upon the vein, by reason of the course of the west located end line, which is not crossed or touched by any vein in the claim. (*Tyler M. Co. v. Sweeney*, 54 Fed. 284.)

## Argument for Respondent

The term "terminal edge," as descriptive of the top or apex of a vein, is not found in the act of Congress. It is true, however, that in a number of cases it will be found that the courts, generally, in instructions to a jury as to what is meant by the top or apex of a vein, have spoken of it as the "terminal edge thereof" or "where the vein is found at or nearest the surface as it is followed in its upward course." In other cases the top or apex has been defined as "the highest or terminal point of the vein" or "where it approaches nearest the surface of the earth and where it is broken on its edge so as to appear to be the beginning or end of the vein." Such expressions or definitions of top or apex, as used in the act, are altogether apt and free from criticism as applied to the vast majority of veins or lodes, for, with rare exceptions, veins are found to occupy a position in the mass of the mountain between the horizontal and the vertical, as though standing on edge, and of course the top or apex of every such vein would present the appearance of a terminal edge, as though it were the end or the beginning of the vein. The rule is fundamental that any language found or expression used in a decision of any court is to be read, understood, and applied in the light of the facts of the particular case with which the court is dealing. (*Cohen v. Virginia*, 6 Wheat. 399; *Parsons v. District of Columbia*, 107 U. S. 45; *Ogden v. Saunders*, 12 Wheat. 198; *French v. Barber Asphalt P. Co.*, 45 L. Ed. 898; *Hans v. Louisiana*, 134 U. S. 1, 20; *Leisy v. Harden*, 135 U. S. 100, 134; *Northern Bank v. Porter Township*, 110 U. S. 608, 615; *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. 737, 748; *Southern Railway Co. v. Simpson*, 131 Fed. 705, 709; *St. Louis L. M. & S. Ry. Co. v. Davis*, 132 Fed. 629, 635; *Mayor v. Erhardt*, 88 Ill. 452, 457; *In Re Johnson*, 98 Cal. 531; *Ex Parte Young Ah Gow*, 73 Cal. 438; *Hart v. Burnett*, 15 Cal. 530.)

No court has been called upon to determine or define what, within the meaning of the act, is to be regarded as the top or apex of a vein or lode, having the form of a single anticlinal fold. Such a deposit is a vein or lode

within the meaning of the act of Congress. (*Stevens v. Williams*, 23 Fed. Cas. No. 13414; *Hyman v. Wheeler*, 39 Fed. 347, 355; *Iron Silver M. Co. v. Cheesman*, 116 U. S. 529, 535; *Duggan v. Davey*, 26 N. W. 887; *Book v. Justice Mining Co.*, 58 Fed. 106, 121.)

The word "top," as used in the act of Congress, is to be understood in its popular sense. (*Duggan v. Davey*, *supra*; *Stevens v. Williams*, 1 Morrison's M. Rep. 557, 561; *Sutherland*, Stat. Constr., secs. 250, 257; *Brewer v. Harris*, 5 Gratt. 298; *Gross v. Fowler*, 21 Cal. 393; *Corning v. Board*, 102 Fed. 57; *In Re Ellis*, 179 Fed. 1002; *U. S. v. Chesebrough*, 176 Fed. 778, 781.)

Where any particular feature or characteristic of a given vein is found to be persistent throughout extensive development, the presumption will be indulged that this feature or characteristic exists in the undeveloped portion. (Lindley on Mines, sec. 615, p. 1474.)

By the Court, NORCROSS, C. J., after stating the facts as above:

This case presents two main questions of law, to wit:

First—Whether the fact that the westerly end line of the surface area of the West End claim as patented, being not a straight, but a broken, line, in and of itself deprives the owner of that claim of extralateral rights upon any vein apexing therein.

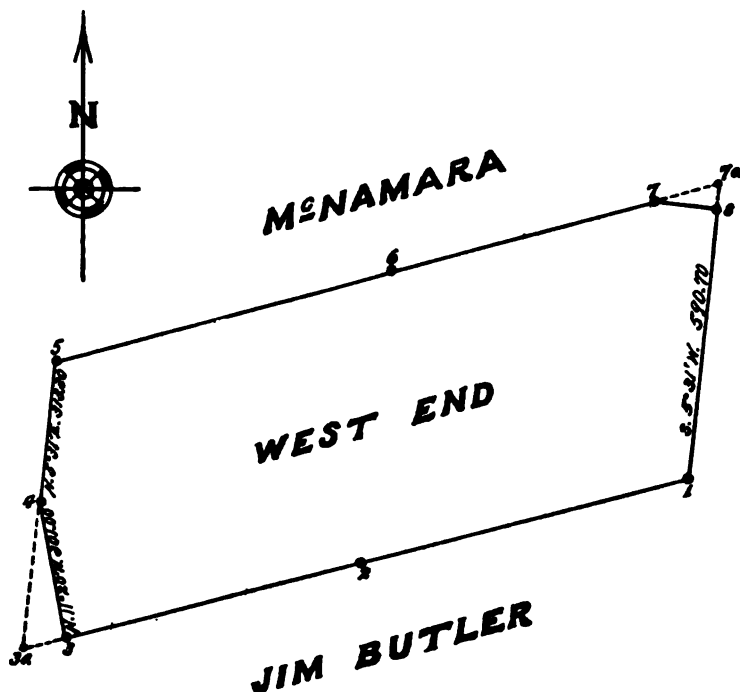
Second—Whether, within the meaning of the act of Congress, the crest or crown of a vein which is found in the form of a single-anticline may be regarded as the top or apex of the vein, and extralateral rights exist upon such vein in opposite directions.

The answer to these questions must be found in an interpretation of that portion of the mining act which contains the grant of extralateral rights, and which reads as follows:

"The locators of all mining locations \* \* \* shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface

lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." (Section 2322, U. S. Rev. Stats.; U. S. Comp. Stats. 1913, sec. 4618.)

The following diagram shows the relative position of the surface boundaries of the patented West End location:



1. The location would embrace a full claim 1,500 feet by 600 feet, excepting for the excluded area embraced within the two triangles 3, 3a, 4, and 7, 7a, 8. The lines 4, 5, and 1, 8, are parallel. While the plat and field notes, accompanying application for the patent, are not in the record, it is probable that they would disclose that the surface boundaries of the claim as located would include the two triangular pieces of ground above mentioned, and that the same were excluded from the patent application because in conflict with prior existing locations. In every great mining district locations are made from time to time in every direction, and a map of such a district presents a confusing mass of conflicting boundaries. In locating a claim the locator may lay his lines upon or across portions of prior existing claims in order to secure parallelism of end lines, and thus secure to himself extralateral rights. (*Del Monte Case*, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72.)

While a locator, prior to patent as well as after patent, may have no greater extent of extralateral rights than the extent of the vein within the boundaries of his surface rights (2 Lindley, sec. 574), he may, prior to patent, have his extralateral rights determined by planes parallel to planes passing through his located end lines, even though one or both of such located end lines are upon the surface ground of contiguous prior claims owned by other parties. This is the rule of the *Del Monte* and other cases. What reason, then, can exist in support of a proposition that because such owner obtained a patent for his claim he must forfeit extralateral rights because in his application for patent he excludes areas in conflict with prior claims, resulting in patented surface boundaries of irregular shape. There is, it seems to us, no reason why such a thing should be. Certainly the securing of a patent to a location ought not to leave a locator with less rights than he had before. That the mining laws are to be liberally construed in favor of the locator is a proposition now too well settled to need a citation of authorities. To hold that, simply because the boundaries of the surface of a



patented claim are so irregular in shape as not to present parallel end lines, due to exclusions of conflict, extralateral rights are lost, is to place upon the statute a construction contrary to its purpose, as that purpose has frequently been enunciated. (*Lawson v. U. S. M. Co.*, 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65; 2 Lindley, sec. 584.)

Even if this is a more liberal construction of the statute than is warranted, which we think it is not, nevertheless, so far as this particular case is concerned, it cannot, we think, be said that the patented surface area of the West End claim does not present parallel end lines. The end lines 1, 8, and 4, 5, are each part of the original located end lines. They should, we think, still be considered end lines, and the true end lines of the patented claim. To so hold requires that the line 3, 4, be regarded as a side line rather than as a part of a so-called broken end line. We think it should be so regarded. Side lines are not required to be parallel. No rule can well be applied governing courses and distances of side lines other than that they shall not be so laid as to increase the statutory width or length of a claim. The line 1, 8, is conceded to be an end line. But if the line 4, 5, is not also an end line, but rather a part of a broken end line, it is drawing a rather fine distinction to say that the lines 3, 4, and 4, 5, are parts of a broken end line, and that the lines 7, 8, and 8, 1, are not. The difference is only in the degree of the angle and the length of the lines—a difference which has no reasonable basis upon which to support a distinction. We think that the ruling that the line 4, 5, is the westerly end line of the West End claim finds support in both reason and authority. (*Walrath v. Champion M. Co.*, 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170.)

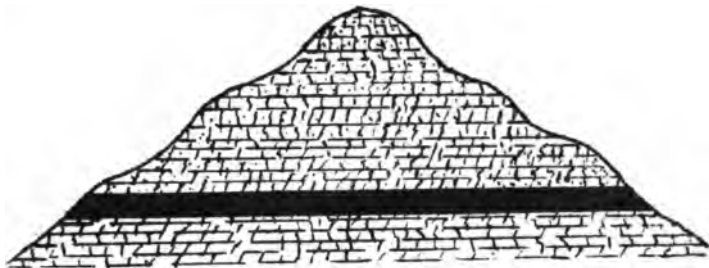
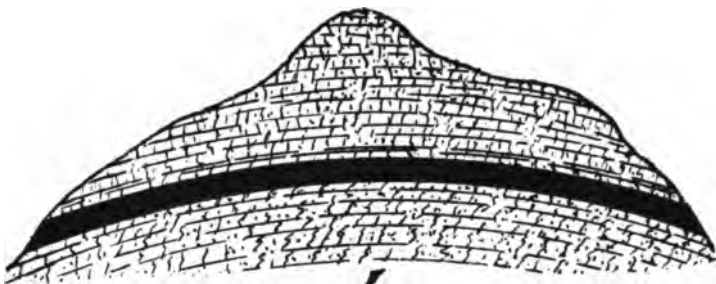
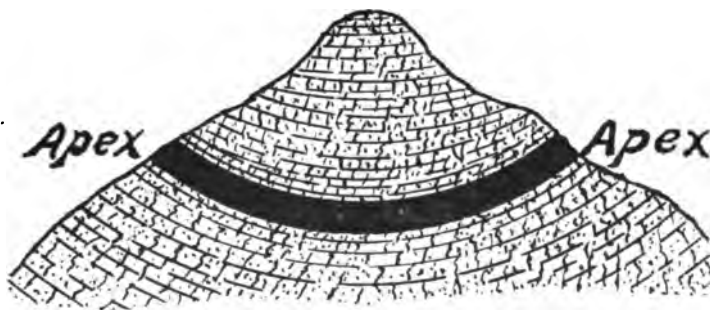
2. We come now to a consideration of the question whether extralateral rights exist upon a vein in the form of a single anticlinal fold. It is the contention of counsel for appellant that such rights do not exist, for the reason, among others alleged, that the federal statute does not contemplate extralateral rights in opposite directions. It is the contention that only veins dipping in the same direction as the discovery vein may be followed

extralaterally; that where within the same location a secondary vein is found dipping in the opposite direction as that of the discovery vein, extralateral rights thereon cannot be enjoyed. We think the statute is not susceptible of this construction. The statute gives to the locators "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, \* \* \* although such veins, lodes, or ledges may so far depart from the perpendicular in their course as to extend outside the vertical side lines of such surface locations."

Congress manifestly contemplated that the locator of a mining claim might discover more than one vein within his surface boundaries, and provided that he should have "all veins, lodes and ledges, throughout their entire depth." But it is contended that the concluding portion of the section, limiting extralateral rights between "vertical planes drawn downward \* \* \* through the end lines \* \* \* so continued in their own direction" negatives an intent to permit extralateral rights in opposite directions, because the words "in their own direction" relate to but one direction, that of the dip of the discovery vein. We are unable to see the force of this contention. The direction of an end line depends upon which end of the line it is viewed from. The courses given in a patent of the two end lines of a claim usually, and doubtless invariably, are in opposite directions. It would be a strained construction, and one, we think, not within the letter or spirit of the statute, to hold that end lines may be considered as having but one direction. If a vein in the form of a single anticlinal fold may be said to have an apex, we think there is nothing in the statute which militates against extralateral rights upon such vein in opposite directions, the same as though it were two veins with separate apices, instead of one vein.

3. The most serious question presented in this case is whether the vein in question may be said to have an

apex. The vein is in the form of a single anticlinal fold, and the precise question presented by a vein in such form appears never, heretofore, to have been determined. Counsel for appellant, in their brief, say:

*a**b**c*

"The definition of the term 'apex' as employed in the mining statute involves the elements of terminal edge of a vein and downward course extending therefrom. According to this definition, the horizontal sheet 'a' on figure 3 here inserted and the anticlinal fold 'b' have no apices, while the synclinal fold 'c' has two apices. \* \* \*"  
[See page 393.]

It is apparent that no extralateral rights could attach to a horizontal vein, as represented in sheet "a," because such vein has no "course downward" as prescribed in the statute. Such a vein has a top, if not an apex, in the strict sense of that word, and will support a valid location. Why a synclinal fold should be said to have two apices and an anticlinal fold have none is not so easy to find a reason for, unless we accept as conclusive appellant's contention that a terminal edge is essential to a true definition of the word "apex" as used in the statute. The words "terminal edge" are not used in the statute, nor have they been of universal use in defining an apex. The great majority of veins have terminal edges, and in all such cases the apex of the vein is its terminal edge. If veins in the form of a single anticlinal roll were the rule rather than the rare exception, we are of the opinion that a contention that a terminal edge was essential to an apex would be as rare as the character of the vein now in question. It has been repeatedly said by courts and text-writers that the words "top" and "apex" were not a part of the miner's terminology prior to the adoption of the federal mining statutes. They were words used by legislators to convey the intent of the framers of the statute. There is no controversy regarding the general purpose and intent of the mining statutes. The government as a matter of public policy was interested in the development of the mining resources of the nation. It offered to the prospector and miner the most liberal reward for his enterprise in discovering and developing the hidden treasures of the earth. It gave him the exclusive possession of the surface of every valid location made, placed no limit upon the number of such locations; gave

him all veins, lodes, and ledges throughout their entire depth, the top or apex of which were within his surface lines. It exacted no price for the land as a condition precedent to mining operations, and placed no restrictions upon him that were not consistent with the public purpose, such as requiring a minimum of annual labor as an evidence of good faith. To say that a miner fortunate enough to discover a valuable vein in the form of a single anticline shall not have extralateral rights upon each limb of his vein because, forsooth, the summit or crest of the anticlinal fold does not present a terminal edge, as is the case of the ordinary form of a fissure vein, in our opinion would do violence to the spirit, if not the very letter of the statute. The well-settled policy of the courts is to construe the statutes liberally in the interest of the miner. It has been determined that if the locator by inadvertence places his location crosswise instead of lengthwise of his vein, he does not lose his extralateral rights, but his side lines will be regarded as end lines, and vice versa. So, too, if his vein crosses an end and a side line, he will be given a new side line for purposes of determining the extent of his extralateral rights. So, too, in the matter of discovery, the first essential to a valid location, the extreme liberality of the courts has been manifested in hundreds of cases.

If a locator finds his surface boundaries embrace the apices of two or more valuable veins, he is simply fortunate the same as the locator whose single ledge is more valuable than the one of his neighbor. The statute makes no distinction between rights of locators based upon the value of the discoveries. Such distinctions are not within the policy of the statute. The only difference between a vein in the form of a single anticlinal fold and the ordinary fissure vein is that the former has a crest, the limbs of which dip in opposite directions, while the latter has a terminal edge and a dip in but one direction. But this distinction presents no difference such as would violate the purpose of the statute if the crest of the former, like the terminal edge of the latter, should be

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held to constitute an apex. The distinguished counsel for appellant, in his great work on Mines, says:

"In the light of the rules announced in the previous articles, if a given mineral deposit is in place, it is a lode. The law assumes that the lode has a top, or apex, and provides for the acquisition of title by location upon this apex. A lode without an apex is not contemplated, and no provision is made for locating it. It cannot be located under the placer laws, because these laws apply only to deposits not in place, and before it can be legally located as a lode, the apex, or top, must be found. If a location is made on the side or on the dip, whoever discovers and properly locates the apex will be entitled to enjoy the full rights accorded to regular valid lode locations, and the rights of those who have located on the side edge, or dip, must yield. The most serious difficulty in defining the apex has arisen in connection with certain flat, or 'blanket,' deposits, which have been judicially determined to be lodes within the meaning of the statutes. It is often quite impracticable to fix upon any exposure of such a deposit which properly constitutes the apex. It is true that after a lode patent is issued, the existence of an apex within the patented ground will be conclusively presumed, but not necessarily the apex of the vein in dispute. Nor will it be conclusively presumed that any particular exposure of the vein is that apex. It must still remain a question of proof." (Lindley on Mines, vol. 1, 3d ed. sec. 305.)

Can it be said with reason that a vein in the form of a single anticlinal fold was not intended to be the subject of a location within the meaning of the mining statutes because it does not possess a terminal edge? It is conceded that it is a vein or lode, and it is well settled that it is one. "All valuable mineral deposits \* \* \* are \* \* \* free and open to exploration and purchase" is the language of the statute. (Rev. Stats. U. S. sec. 2319; U. S. Comp. Stats. 1913, sec. 4614.) The federal statutes clearly contemplated that the vein in question was subject to location, for it made no exclusions of veins of any

particular character. If a vein without an apex is not contemplated, and no provisions made for locating it, as the distinguished author says, then it follows as a necessary conclusion that the vein in controversy has an apex. If it has an apex, there is no other possible place for it to be than at the crest of the anticlinal fold.

It is contended, however, that the Supreme Court of the United States is committed to the view that a terminal edge is essential to an apex of a vein or lode, and the recent case of *Stewart Mining Company v. Ontario Mining Company*, 237 U. S. 350, 35 Sup. Ct. 610, 59 L. Ed. 989, is cited in support of this contention. In that case, Mr. Justice McKenna, speaking for the court, said:

"An apex is, on cited authority, defined to be 'all that portion of the terminal edge of a vein from which the vein has extension downward in the direction of the dip.' And it is further said that the definition has been approved in Lindley on Mines, because, as therein expressed, it 'involves the elements of terminal edge, and downward course therefrom.' We may accept the definition. In its application, however, it immediately encounters a question of fact—the locality of the terminal edge; and in this case the state courts did not find it to be where plaintiff asserted it to be."

The court in the *Stewart-Ontario* case did "accept the definition" of apex to be the terminal edge of the vein. The vein in controversy in that case had a terminal edge, and there was no occasion to consider whether the definition given was comprehensive. The Idaho court, from which the case was reviewed, on error, had determined that that which the Stewart Company claimed was an apex was only the side of the vein where the vein on its strike was cut off by a fault. The Idaho court was sustained. (See same case, 23 Idaho, 724, 132 Pac. 787, and *Stewart M. Co. v. Bourne*, 218 Fed. 327, 134 C. C. A. 123.)

As said by Chief Justice Marshall in the celebrated case of *Cohens v. Virginia*, 6 Wheat. at page 399, 5 L. Ed. 257:

"It is maxim, not to be disregarded, that general

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expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

This maxim has been reiterated times almost without number. It is applicable to the Stewart-Ontario decision. The definition was sufficient for the question involved in that case; otherwise we may assume the question would have been given more consideration than the laconic sentence, "We may accept the definition." Judge Hawley, in *Book v. Justice Mining Co.*, 58 Fed. (C.C.) at page 121, in reference to the definition of a vein or lode; said:

"Various courts have at different times given a definition of what constitutes a vein, or lode, within the meaning of the act of Congress; but the definitions that have been given, as a general rule, apply to the peculiar character and formation of the ore deposits, or vein matter," etc.

The Idaho court, in the Stewart-Ontario case, *supra*, at page 737 of 23 Idaho, page 792 of 132 Pac., speaks of the definition of the word "apex" as follows:

"The definitions of the word 'apex' as used in the statute (section 2322, U. S. Rev. Stats.) all reach the one inevitable conclusion that it is the highest point in the vein (*Flagstaff Silver M. Co. v. Tarbet*, 98 U. S. 469, 25 L. Ed. 253; 9 Morr. Min. Rep. 607; *Lindley on Mines*, 2d ed. secs. 305, 309; *Costigan on Mining Laws*, p. 137, sec. 35; *Dugan v. Davey*, 4 Dak. 110, 26 N. W. 887; 17 Morr. Min. Rep. 59; *Del Monte M. Co. v. Last Chance M. Co.*, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; 19 Morr. Min. Rep. 370), but this is only a general definition, and its application to any particular vein or peculiar location may, and often will,



call for further particularity of description. It must be the top or terminal edge of the vein on the surface or the nearest point to the surface, and it must be the top of the vein proper rather than of a spur or feeder, just as the highest point in the roof of a house would be taken to be the apex of the house, and not the chimney or flagstaff. Again, an apex is a point from which the vein has a dip, as well as strike, or course, else it confers no extralateral right."

Where a vein has a terminal edge its apex is a point from which, or a line along which, is its strike, and from which it has a dip, but this is equally true of the crest of a vein in the form of a single anticlinal fold. Counsel for appellant quote the following definitions from text-writers in support of the terminal edge theory:

"Conceiving a vein or lode to be an intrusive sheet of mineralized matter of varying thickness found in the mass of the mountain, the apex of a vein is thus seen to be that edge of the sheet which shows on the surface of the location, or is nearest to the surface. It is not a point, though apex naturally suggests point. It is not a line, though it has the full extension of the upper edge of the lode. It is the whole surface of the upper edge of the vein, with all the width and length which that edge has." (Costigan on Mining Laws, 139, 140.)

"The mere fact of proximity to the surface is insufficient to establish the apex without the evidence that it is the upper edge or end of the vein." (Barringer and Adams, *The Law of Mines and Mining*, p. 442.)

"In the mathematical sense, an apex means the highest point; but it is not used in this sense in the statute. As used therein, it means the edge or termination of the vein which comes to the surface of the earth, forming an outcrop, or which comes nearest to the surface of the earth when the vein terminates before it reaches the surface. \* \* \* It may not be the highest point of a vein, as such highest point may be found in a swell of the vein." (Shamel, *Mining, Mineral and Geological Law*, 193, 197.)

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"The top or apex of a vein or lode is the highest point thereof, and may be at the surface of the ground or at any point below the surface; the end or edge of a vein nearest the surface." (Mines and Minerals, 27 Cyc. 537.)

"The end or edge of a vein nearest the surface." (Raymond, Glossary of Mining and Metallurgical Terms, Trans. Am. Inst. M. E. vol. 9, p. 102.)

It is quite manifest, we think, that all the definitions quoted are considering the ordinary form of vein. Definitions given by text-writers are usually based on court decisions, and like such decisions are to be considered with reference to the facts upon which they are based. From section 306 of Lindley on Mines, we quote:

"Webster defines an apex to be 'the top, point, or summit of anything.' Compilers of dictionaries which have made their appearance since the act under consideration was passed have not been particularly lucid in their definitions. For instance: Standard Dictionary: '(1) The pointed or angular end, or highest point, as of a pyramid, spire, or mountain; extreme point; tip; top. (2) The vertex of a plane or solid angle. (3) The highest point of a stratum, as a coal seam.' Century Dictionary: '(1) The tip, point, or summit of anything. In geometry, the angular point of a cone or conic section. The angular point of a triangle opposite the base. (2) In geology, the top of an anticlinal fold of strata. This term, as used in United States Revised Statutes, has been the occasion of much litigation. It is supposed to mean something nearly equivalent to outcrop; but precisely in what it differs from outcrop has not been, neither does it seem capable of being, distinctly made out.' Evidently the courts even now can receive but little assistance from the lexicographers."

It appears, however, that the Century Dictionary, in an effort to give a comprehensive definition regards "the top of an anticlinal fold of strata" as an apex. Counsel for appellant, in their brief, say:

"Probably the most interesting and instructive of all the adjudicated cases is the pioneer case of *Duggan v.*

*Davey*, 4 Dak. 110, 26 N. W. 887. The decision of the Supreme Court of Dakota follows, in the main, the opinion given by the trial court. It is a lucid and masterly presentation of the law; and, while an anticlinal roll was not there involved, several expressions of the court are well worth quoting in support of our contention that a terminal end or edge of a vein is an essential element of apex definition. 'The definition of the top or apex of a vein usually given is "the end, or edge, of a vein nearest the surface." \* \* \* Justice Goddard, a jurist of experience in mining law, in his charge to the jury in the case of *Iron Silver v. Louisville*, defines "top or apex" as the highest, or terminal, point of a vein "where it approaches nearest the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein." \* \* \* '

Some expressions of the court used just prior to the language last quoted are instructive:

"The definition of the top, or apex, of a vein usually given is, 'The end, or edge, of a vein nearest the surface,' and to this definition the defendants insist we must adhere with absolutely literal and exclusive strictness, so that wherever, under any circumstances, an edge of a vein can be found at any surface, regardless of all other circumstances that is to be considered as the top or apex of the vein. \* \* \* The definition given is, no doubt, correct under most circumstances, but, like many other definitions, is found to lack fullness and accuracy in special cases; and I do not think important questions of law are to be determined by a slavish adherence to this letter of an arbitrary definition. It is indeed difficult to see how any serious question could have arisen as to the practical meaning of the terms 'top' or 'apex,' but it seems in fact to have become somewhat clouded. I apprehend if any intelligent person were asked to point out the top, or apex, of a house, a spire, a tree, or hill, he would have no difficulty in doing so, and I do not see why the same common sense should not be applied to a vein or lode."

In the *Duggan v. Davey* case, the question was whether an exposed side of a vein, caused by erosion or some other agency, upon which locations were made, constituted the apex of the vein. The question was substantially the same as that involved in the Stewart-Ontario case, *supra*. The same contention appears to have been made in this case, based upon the fact that the westerly portion of the vein within the West End claim, by some titanic eruption of the earth's surface, had been cut off, leaving a sharply defined, but irregular, broken edge.

The case of *Illinois S. M. Co. v. Raff*, 7 N. M. 336, 34 Pac. 544, is cited by counsel for appellant as "a case possessing many points of similarity to the case at bar." In that case the court said:

"We can recognize the definition of a vein as given by Judge Hallett in *Hyman v. Wheeler*, 15 Mor. 519, and still see that the jury in this cause might from the evidence have determined that here was a vast bed, lode, zone, or mass of mineral-bearing lime, with no footwall and, in some localities, with no hanging wall or even cap, in others covered with shale, the lime body extending throughout the Illinois, the Calamity, the Andy Johnson, Brush Heap, and locations west and south of the Illinois, as well as possibly other mines. That this body or mass, zone, or lode of lime was broken or cut up into fissures, gashes, pockets, veins, etc., and these spaces filled with mineral \* \* \*; in fact, we might accept either of the theories advanced by geologists and mineralogists as to the formation of the rock or deposit of mineral, and there yet would be nothing to prevent our reconciling that theory with the verdict of the jury in this cause, that there was neither a vein nor an apex upon the Illinois mine, or at least such a vein as could be followed beyond the side lines of that claim. There may be a contact, and yet no contact vein. The mineral may be exposed at a point upon one claim and followed continuously under the surface from this point to another property, though an undisputed vein between clearly defined hanging and footwalls, and still the point at which mineral is exposed

not be the apex of the vein which may have an apex ten miles distant, or may have no apex at all. \* \* \* The zone or mass may follow the undulations of a broken country down into the valley, and rising over the divides, cutting through, covered by, or overlapping, other formations, but until it is broken and the edges exposed or some edge or end as a beginning point found from which it can be followed down at some angle below the horizontal, there is no apex from which it can be followed beyond the side lines of a claim located upon it."

The facts before the New Mexico court were so different from those of the case at bar that we think the case affords little aid in determining the question here.

Our attention has been directed to definitions of the word "apex," given in instructions to juries by Judge Hallett in the case of *Iron Silver M. Co. v. Murphy* (D. C.) 3 Fed. 368, and by Justice Miller in the case of *Stevens v. Williams*, Fed. Cas. No. 13413, both cases growing out of the peculiarities of the Leadville ore deposits. Referring to the character of these ore deposits, Lindley, at section 300, says:

"The blanket deposits at and in the vicinity of Leadville, Colo., have given rise to most of the controverted questions on the subject of 'lodes,' 'veins,' 'inplace,' 'top,' and 'apex'; and the burden of solving many of these difficulties in the first instance fell to the lot of Judge Hallett. His decisions have furnished the text for other courts, in other jurisdictions, where analogous conditions have been, to a limited extent, encountered."

Again, in section 311, the author says:

"As in almost all other phases of the mining law, the flat deposits of Leadville have produced their full quota of adjudicated law on the subject of 'tops' and 'apices.' As these deposits are legally held to be veins, or lodes, of rock in place, subject to mineral location, the law contemplated that they should have apices."

The section includes a number of figures illustrative of the Leadville formation, none of which present any similarity to the vein in controversy here. Justice Miller

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instructed the jury relative to the facts in the Stevens case, *supra*, among other matters as follows:

"The top or the apex of a vein, within the meaning of the act of Congress, is the highest point of that vein where it approaches nearest to the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein. The word 'outcrop' has been used in connection with it. \* \* \* It means the nearest point at which it is found toward the surface of the earth. And where it ceases to continue in the direction of the surface is the top or apex of that vein. It is said in this case that the point claimed to be the top or apex is not such, because at the points where plaintiff shows, or attempts to prove, an interruption of that vein, in its ascent towards the surface, and what he calls the beginning of it, the defendants say that is only a wave or roll of the general shoot of the metal, and that from that point it turns over and pursues its course downwards as a part of the same vein, in a westerly or southwesterly direction. It is proper, I should say to you, if the defendants' hypothesis be true, if that point which the plaintiff calls the 'highest point,' the 'apex' is merely a swell in the mineral matter, and that it turns over and goes on down in a declination to the west, that it is not a true apex within the statute. It does not mean merely the highest point in a continuous succession of rolls or waves in the elevation and depression of the mineral nearly horizontal."

We have here a very different state of facts than were involved in the Leadville cases. In those cases the court was dealing with a mineral formation nearly horizontal or varied by a series of anticlinal and synclinal rolls. Here we have a vein in the form of a single anticline.

The land commission created by act of Congress of March 3, 1879, c. 182, 20 Stat. 394, sought and obtained, among other matters, many definitions of the word "apex" as used in the mining statutes. Many of these definitions are embodied in section 307 of Lindley. Relative to these definitions the author says:

"Judge Beatty, then Chief Justice of Nevada, gave the clearest and most comprehensive of all the definitions. It is as follows: 'The top, or apex, of any part of a vein is found by following the line of its dip up to the highest point at which vein matter exists in the fissure.' According to this definition, the top, or apex, of a vein is the highest part of the vein along its entire course. If the vein is supposed to be divided into sections by vertical planes at right angles to its strike, the top, or apex, of each section is the highest part of the vein between the planes that bound that section. \* \* \* Of course, there are irregular mineral deposits departing widely in their characteristics from the typical or ideal vein which seems to have been in the mind of the framer of the act of 1872. To such deposits the foregoing definitions will not apply; and, in my opinion, great difficulty will be experienced in any attempt to apply the existing law to them."

If we apply the definition of Judge Beatty to the vein here involved, and follow the line of the dip of either or both limbs of the anticline to the highest point, we come to the crest. There is nothing in this definition which militates against the crest of the anticlinal roll being the apex of the vein, unless it is assumed or conceded that a vein can have but a dip in one direction.

There can be, and there is, no question in this case but that the so-called West End-McNamara vein was subject to location. If it be true, and we assume that it is, that the law contemplates that every vein has an apex (Lindley, secs. 305, 311), then it necessarily follows, we think, that the crest of the anticlinal roll is the apex. Certainly by no process of reasoning can it be said that the apex lies in either Jim Butler or McNamara ground, except as the crest of the anticline may be in McNamara territory after it crosses the northerly side line of the West End claim.

The judgment is affirmed.

[NOTE—On writ of error to United States Supreme Court.]

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Points decided

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[No. 2243]

**DEWITT C. TURNER, PETITIONER, v. W. A. FOGG,  
COUNTY CLERK OF WASHOE COUNTY, AND A. E.  
WILSON, COUNTY CLERK OF CHURCHILL COUNTY,  
NEVADA, RESPONDENTS.**

[159 Pac. 56]

**1. STATUTES—SUBJECTS AND TITLES.**

The act of March 29, 1915 (Stats. 1915, c. 283), entitled "An act regulating the nomination of candidates by political parties, providing for the holding of primaries and conventions, and regulating the manner of nominating candidates by petition," does not contravene the constitution, art. 4, sec. 17, providing that each law shall embrace but one subject and matters properly connected therewith, which subject shall be embraced in the title.

**2. STATUTES—PARTIAL INVALIDITY.**

The unconstitutionality of one section of a law does not destroy the validity of other provisions which can stand independent of such section.

**3. CONSTITUTIONAL LAW—VALIDITY OF STATUTES—APPORTIONMENT.**

Where a petition fails to show that authorized representatives of the Progressive party sought to preserve the rights of their party under section 8, Stats. 1915, c. 283, for the apportionment of convention delegates, *held* that petitioners for writ of prohibition cannot question the validity of section 3, providing for apportionment on the basis of vote for congressmen at the last election.

**4. CONSTITUTIONAL LAW—STATUTES—NOMINATIONS—VALIDITY—ENFORCEMENT.**

On an application for prohibition on the eve of election to annul Stats. 1915, c. 283, providing for the nomination of candidates by political parties, and the holding of primaries and conventions, the court will not speculate on the effect of possible contingencies on the validity of the act, nor annul it because contingencies may arise under section 11 of such act which would make the act impossible of enforcement.

**5. ELECTIONS—REGISTRATION OF PARTY AFFILIATION—VALIDITY OF STATUTE.**

Stats. 1915, c. 283, secs. 12 and 14, requiring electors to register their party affiliation as a prerequisite to the right to vote at primary election, is a reasonable regulation and valid exercise of the legislative power.

**6. ELECTIONS—PRIMARY ELECTIONS—REGISTRATION.**

Under Stats. 1915, c. 283, secs. 12 and 14, which was not repealed by Stats. 1915, c. 285, sec. 8, the names of electors which appear upon the certified registration list as copied from the register of the last general election, together with the names that appear on the supplemental list, constitute the list of electors qualified to vote at the primary election.



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Argument for Petitioner

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## 7. ELECTIONS—STATUTES—CONSTRUCTION.

Election laws are to be liberally construed to enable the largest participation of qualified electors in all elections.

**ORIGINAL PROCEEDING.** Application for a writ of prohibition by Dewitt C. Turner against W. A. Fogg, County Clerk of Washoe County, and another, to contest the constitutionality of Stats. 1915, c. 283. Application denied, and proceedings **dismissed**.

*W. W. Griffin*, for Petitioner:

The act of the legislature, approved March 29, 1915, under which respondents are making preparations for a primary election to be held on the second Tuesday in August, 1916, is wholly null and void, being contrary to and violative of the constitution of the State of Nevada and the constitution of the United States. It is null and void because it is impossible of enforcement and execution. It violates the requirements of section 17, article 4, constitution of the State of Nevada, in that the title includes distinct subjects excluded by the provisions of said act, contains matter not properly connected with the subject, and in that the title does not briefly express the subject of the act.

It is further unconstitutional in that it prohibits petitioner, or any member of a political party which did not have a candidate for Congress at the last election, from voting at said primary, thus depriving him of his constitutional rights, and in that it denies the benefits of said law to any political party, or any elector thereof, which may have come into existence since the last election for representative in Congress.

All the regulations of the elective franchise must be reasonable, uniform, and impartial. (9 R. C. L. 982.) Legislative regulations as to the manner of voting and the restrictions placed thereon must be tested frequently by the broad rule laid down in many constitutions to the effect that elections must be "free and equal." Under such a guaranty the right to vote, as the words expressly state, must be maintained absolutely free, and the vote of

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every elector must be granted equal influence with that of every other elector. (9 R. C. L. 984.)

*Geo. B. Thatcher*, Attorney-General, *E. F. Lunsford*, District Attorney of Washoe County, and *Eli Cann*, District Attorney of Churchill County, for Respondents:

The petition does not state a cause of action sufficient to entitle the petitioner to the relief prayed for. As has been repeatedly decided by different courts of the United States, as well as by this court in different instances, the writ of prohibition is a discretionary one, and should not issue unless the petition shows that some redress is necessary to be given by the court or that some privilege guaranteed to a person is about to be withheld from him. There is no allegation that the Progressive party is such a party as is recognized by section 2 of the act as a political party, nor does the petitioner allege that he has registered, as the act requires, and has stated his politics as being that of a Progressive, and that he is entitled to vote for a delegate to the Progressive convention.

This proceeding is to attack the constitutionality of the so-called primary act. Counsel for the petitioner has not cited a single constitutional provision that is violated by the act. The act might have been better framed and made easier of enforcement and execution, but it is not in any respect unconstitutional. Every point which has been raised by the petitioner in support of his petition has been already disposed of by this court. (*Riter v. Douglass*, 32 Nev. 400.)

*H. V. Morehouse*, *George Springmeyer*, *S. S. Downer*, *Thos. E. Kepner*, *James Glynn*, *J. M. Frame*, *Anthony Jurich*, and *N. J. Barry*, *amici curiæ*.

By the Court, COLEMAN, J.:

This is an original proceeding in prohibition, designed to test the constitutionality of that certain act of the legislature approved March 29, 1915, entitled "An act regulating the nomination of candidates by political parties,

providing for the holding of primaries and conventions, and regulating the manner of nominating candidates by petition." (Stats. 1915, p. 453.)

The petition in this case was filed July 17, 1916, and an alternative writ issued returnable July 22. The importance of the case and the shortness of the time allowed for its consideration caused the court to request a number of prominent attorneys of the state to appear as friends of the court, for the purpose of giving the court the benefit of their several opinions, in order that a correct conclusion might be reached. In view of the fact that petitioner delayed his objections to the act until so short a time before the election provided for in the act sought to be annulled, and in view of the fact that the petition does not show that petitioner sought to secure any rights alleged to be guaranteed to him and infringed by the act in question, through the medium of authorized representatives of his party or by application in any way to other legally constituted authorities, this court might well be justified in refusing to consider any questions presented under the extraordinary writ prayed for, which writ rests in the sound discretion of the court.

For the purpose of avoiding possible future litigation, the court will determine certain of the contentions made by petitioner which bear upon his rights as a member of the Progressive party. Certain other questions in which the petitioner's rights are only in common with those of all electors generally will not be determined in this proceeding.

We may premise what we will say in discussing the questions deemed important to be determined or referred to by referring to the well-settled proposition of law that all presumptions are in favor of the constitutionality of acts passed by the legislature, and that all reasonable doubts are determined in favor of legislative enactments, and that courts have nothing to do with questions which go to mere policy or expediency of acts of the legislature. It is proper here to state that the arguments presented showed a wide difference of opinion relative to the

constitutionality of the act in question, both by counsel appearing for the parties to the proceeding and those appearing as friends of the court.

1. It was contended: First, that the whole act was void because the title contains more than one subject, in violation of section 17 of article 4 of our constitution. We think the objections to the title of the act are fully answered by former decisions of this court, particularly in the case of *State v. State Bank and Trust Co.*, 31 Nev. 456, 103 Pac. 407, 105 Pac. 567. It is also contended that section 3 of the act in question deprives petitioner of his rights as an elector and member of the Progressive party because that section apportions delegates to the state and county conventions on the basis of the vote for representative in Congress at the last preceding election, and that the party of which he is a member, having had no candidate for representative in Congress at such election, is therefore deprived of participating in the primary election. It is conceded, under the provisions of section 2 of the act in question, that the Progressive party is within the classification of parties entitled to the privileges of the act in question. It is not alleged in the petition that the representatives of the party of which petitioner alleges himself to be a member made any attempt to avail themselves of the privileges of the act by complying with the provisions of section 8, or that the petitioner made any request of the state and county central committees of his party to apportion delegates to the state and county conventions as prescribed in such section prior to the time fixed in such section, or at all, for such action by such state or county central committees.

Assuming, however, for the purposes of this decision, that the rights of a party elector may not be cut off by reason of the failure or neglect of the duly constituted state or county party central committees, we shall consider whether the provisions of section 3 actually have the effect of depriving a political party otherwise entitled to the privileges of the act from participating in the primary election.

It is provided in section 29 of the act that:

"This act shall be liberally construed, to the end that the real intent of the electors shall prevail."

As before pointed out, section 2 of the act gives the Progressive party the positive right to proceed "to elect delegates to party conventions as hereinafter provided."

2. If we were to assume that section 3 is unconstitutional, and so hold, such holding would not destroy the validity of other provisions of the act, which could stand independent of said provisions. It is the contention of counsel for respondents that the provision in question is directory merely, and not binding upon a party otherwise entitled to the benefits of the act, but which cannot comply with this basis of apportionment. Authorities have been cited which seem to sustain this view. (*Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1126.)

3. As the duly authorized representatives of petitioner's party, so far as appears from the petition, did not, within the time prescribed by the provisions of section 8, seek to preserve the rights of their party by any other reasonable method of apportionment, we cannot see where the petitioner is entitled, particularly in this character of proceeding, to question the validity of this particular provision of the act.

4. It is contended by petitioner that section 11 of the act renders the entire act void because, under contingencies which may arise under the provisions of that section, the act would be impossible of enforcement. Our attention has not been directed to any specific provision of the constitution which this section violates. If the officers and party representatives named in the section perform the duties prescribed, no manifest difficulty would arise in carrying out the provisions of the section. We think it not within the proper province of the court, in a proceeding of this extraordinary character, instituted virtually on the eve of the election provided for in the act, to speculate upon what the effect would be should certain possible contingencies arise under the provisions of this section.

5. It has been contended that the act is void because the provisions of sections 12 and 14 together limit the

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right to vote at the primary election to electors only who have duly entered upon the register the designation of their party affiliation. It is well settled that the requirement for registration of party affiliation as a prerequisite to the right to vote at a primary election is a reasonable regulation and a valid exercise of legislative power. (R. C. L. p. 1075, sec. 89.) In this connection the question was suggested in the arguments of respective counsel as to what registration controls for use at the primary election. The question is one of great importance and doubtless will result in future litigation unless now determined. We think it clear that the specific provisions of sections 12 and 14 relating to primary elections are controlling as to what electors are entitled to vote at the primary election. Section 12 of the act in question, in prescribing the qualifications and regulation of voters at the primary election, among other things provides that the same officers who prepare and furnish registers for general elections shall prepare and furnish them for use at primary elections, and it is made the duty of these officers to furnish and certify lists of the voters entitled to vote at such primary election. In providing as to how the register for such primary election shall be made, the statute sets forth:

"Said register shall be made by taking the names of all voters on the register used at the last general election in the city, precinct, or county, together with supplemental registers or additions showing all additional registrations, changes, and corrections made since the last general registration. The supplemental registers to be made as follows: All persons entitled to register or vote at any primary election in any precinct, city, or county whose names are not upon the register, or who may be entitled to transfer their registration, shall be entitled to be registered or transferred so as to enable them to vote at such primary election, and for that purpose it shall be the duty of the officer charged with the registration of voters of such precinct, city, or county, to keep his office open for at least fifty days prior to ten days immediately preceding such primary election, and to register all voters

entitled to vote at such primary election. (Stats. 1915, p. 457, sec. 12.)

It is clear to our mind that under the provisions of the section quoted all voters whose names appeared on the register used at the last general election in any city, precinct, or county are, by the terms of the act, regarded as duly registered electors for the primary election contemplated by the law, and their names are to be certified by the proper officers as having been duly copied from the registration lists of the last general election.

6. In addition to this register of voters, a supplemental register is provided for by the section, and this supplemental register makes provision for the registration of any voter entitled to register or vote at the primary election in any precinct, city, or county whose name is not upon the register of the last general election in such city, precinct, or county. The registered voters whose names appear upon the certified lists as copied from the register of the last general election, together with the names that appear on the supplemental register, constitute the list of electors qualified to vote at the primary election.

The general election law (Stats. 1915, c. 285), entitled "An act relating to election," approved on the same day as the act in question, is, in the main, a mere compilation of prior existing election laws. Section 8 of the general election law provides, "A new registration of the electors of this state shall be made in the year of 1916, within the dates hereinafter specified, and every two years thereafter," and is precisely the same provision which was contained in the act of 1913, except that the figures 1916 were substituted in lieu of those of 1914. The general law regulating registration which has been in force in this state for many years contemplated a new registration for the general election every two years. By no reasonable construction could it be said that the provisions of section 8 of the general election law repeal or modify the provisions of section 12 of the primary election law. Section 12 of the primary election law of 1915 is, except as to immaterial modifications, precisely the same as section 17 of chapter 3, Stats. 1913, p. 520, and the same

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as section 17 in the primary election law of 1909 (Rev. Laws, 1751). It is therefore clear that the legislature of 1915 did not make any change in the prior existing law in so far as registrations for primary elections is concerned.

7. It is well settled that election laws are to be liberally construed to enable the largest participation in all elections by qualified electors. Undoubtedly all the electors whose names do not appear upon the register "used at the last general election in the city, precinct, or county," and who register for the general election of 1916 prior to the time at which registration closes for the primary election, are entitled to have their names placed upon the register for such primary election.

As said by the Supreme Court of Pennsylvania, in a similar case recently decided:

"If it were our duty to make the law, no doubt some of its provisions would be written differently, but we cannot declare an act void because in some respects it may not meet the approval of our judgment, or because there may be difference of opinion as to its wisdom upon grounds of public policy. Questions of this character are for the legislature, and not for the courts. If the restrictions complained of in this proceeding are found to be onerous or burdensome, the legislature may be appealed to for such relief, or for such amendments, as the people may think proper to demand. (*Winston v. Moore*, 244 Pa. 447, 91 Atl. 520, L. R. A. 1915A, 1190, Ann. Cas. 1915C, 498.)

Application for the peremptory writ is denied, and the proceedings are dismissed.

It is so ordered.

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Points decided

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[No. 2219]

**ALPHONS GLOCK, APPELLANT, v. FRITZ ELGES,  
RESPONDENT.**

[159 Pac. 629]

**1. APPEAL AND ERROR—STATEMENT—TIME FOR FILING—WAIVER OF  
DEFECTS IN NOTICE.**

Under Rev. Laws, 5331, requiring a proposed statement to be served and filed within thirty days after written notice of the judgment or order appealed from, any defect in such notice is waived by serving and filing a notice of appeal.

**2. APPEAL AND ERROR—STATEMENT—TIME FOR FILING—FAILURE TO  
FILE—EFFECT.**

A failure to serve and file a statement within the time prescribed by Rev. Laws, 5331, does not defeat the appeal, where it was duly perfected under section 5330, by filing a notice of appeal and undertaking or waiver thereof.

**3. APPEAL AND ERROR—STATEMENT—TIME FOR FILING—FAILURE TO  
FILE—EFFECT.**

A statement, not served and filed within the time prescribed by Rev. Laws, 5331, cannot be considered on appeal.

**4. FORCIBLE ENTRY AND DETAINER—CIVIL LIABILITY—PERSONS  
ENTITLED TO SUE.**

In an action to recover damages for forcible entry, plaintiff must prove his title or right to possession of the property where the pleadings raise that issue.

**5. APPEAL AND ERROR—NECESSITY OF STATEMENT—APPEAL FROM  
ORDER.**

Upon appeal from an order denying costs, the pleadings cannot be considered unless embodied in a statement attached to the order.

**6. JUDGMENT—JUDGMENT ROLL—MATTERS INCLUDED.**

A judgment roll includes the pleadings and judgment.

**7. FORCIBLE ENTRY AND DETAINER—COSTS—STATUTE.**

Rev. Laws, 5377, allowing plaintiff costs upon a favorable judgment in an action involving the title or possession of real estate, applies to recovery of damages for forcible entry, where plaintiff's title or right of possession was disputed.

**8. COSTS—ITEMS—CLERK'S FEES—STRIKING COST BILL.**

Under Rev. Laws, 5387, requiring the clerk to tax his fees, such fees should be taxed in favor of a prevailing plaintiff, although the bill of costs was properly stricken.

**9. FORCIBLE ENTRY AND DETAINER—DAMAGES—STATUTE—"MAY."**

Rev. Laws, 5508, providing that in forcible entry cases, judgment "may" be entered for treble the actual damages, permits, but does not require, such penalty to be imposed.

## Argument for Appellant

## 10. FORCIBLE ENTRY AND DETAINER—APPEAL—DETERMINATION OF CAUSE—MODIFICATION—INCREASING RECOVERY.

The supreme court will not modify a judgment to allow treble damages in a forcible entry case, under Rev. Laws, 5508, where the facts are not before it.

## 11. APPEAL AND ERROR—RIGHT OF REVIEW—SATISFACTION IN PART.

Plaintiff does not waive his right of appeal from that portion of a judgment denying him costs by accepting payment for the damage and interest items, and satisfying the judgment to that extent.

APPEAL from First Judicial District Court, Douglas County; *Frank P. Langan*, Judge.

Action by Alphons Glock against Fritz Elges. Judgment for plaintiff, and he appeals from that portion denying him costs, and from those parts of an order which directed entry of judgment upon the verdict without costs and struck out his cost bill. **Affirmed as modified.**

*George Springmeyer*, for Appellant:

The judgment should be reversed, with directions that the trial court enter judgment for appellant for treble damages, and for costs for appellant as taxed in the cost bill. The appeal was taken in due time. The statutory provisions in regard to appeal are plain and conclusive. (Rev. Laws, 5330; Hayne, *New Trial and Appeal*, sec. 206; *San Francisco Co. v. California*, 141 Cal. 354, 74 Pac. 1047; *Estate of Davis*, 151 Cal. 318, 86 Pac. 183; *Arthur v. Mounce*, 4 Idaho, 487, 42 Pac. 509; *Threlkeld v. O'Neal*, 26 Mont. 209, 66 Pac. 940.)

No notice of the decision was served upon the attorney for the plaintiff. The mailing of a certified copy by the clerk was not sufficient. (Rule VII, District Court; Rev. Laws, 5367, 5369.)

Where notice of the judgment is required, the time for appeal begins to run only from the service of notice as the same is established of record. (*Foss v. Johnstone*, 158 Cal. 119, 110 Pac. 294; *Otis Bros. & Co. v. Nash*, 26 Wash. 39, 66 Pac. 11; *Impr. Co. v. Land Co.*, 132 Pac. 760; *Roush v. Van Hagen*, 17 Cal. 122; *Dooling v. Moore*, 20 Cal. 142; *Gimmy v. Doone*, 22 Cal. 635; *Gray v. Palmer*, 28 Cal. 416; *Peck v. Curtis*, 31 Cal. 207; *Genella v. Ralyea*, 32 Cal. 159;

## Argument for Respondent

*Bay v. Van Rensselaer*, 1 Paige, 423; *Jackson v. Wiseburn*, 5 Wend. 136; *Wait v. Van Allen*, 22 N. Y. 319; *McClung v. McClung*, 39 Mich. 55; *Richardson v. Yawkey*, 9 Mich. 139; *Fairchild v. Edson*, 144 N. Y. 615; *Rohr v. Lynch*, 137 N. Y. Supp. 752; *Cowie v. Harker*, 143 N. W. 895.)

Even if the statement on appeal was not filed in time, there is still the judgment roll for appellant to rely upon. The judgment roll contains everything which it is necessary for the court to consider on this appeal. (Rev. Laws, 5331, 5338.)

The right of appeal from the objectionable part of the judgment is not lost because of the satisfaction of the judgment as rendered. So far as it goes, the appellant accepts the judgment, but appeals from that part of it denying him additional relief. (*Coffman v. Bushard*, 130 Cal. 425.)

Costs of suit should be allowed plaintiff as of course, despite the fact that the verdict was for less than \$300, the action being one involving the title or possession of real estate. (Rev. Laws, 5377; *Hart v. Carnall-Hopkins Co.*, 37 Pac. 196, 199; *Copertini v. Oppermann*, 18 Pac. 256, 258; *Gibson v. Anderson*, 78 Pac. 953; *Crossman v. Lander*, 3 Or. 495; *Powell v. Rust*, 8 Barb. 567; *Kelly v. New York Co.*, 19 Hun, 363; *Boyle v. Lawton*, 3 How. Prac. n. s. 444; *Grosse v. City*, 9 S. D. 165, 68 N. W. 310; *Willard v. Baker*, 68 Mass. 336; *Burnham v. Ross*, 47 Me. 456; *Dunster v. Kelly*, 110 N. Y. 558; *McAllister v. Brents*, 48 Ky. 483; *Lowers v. Leach*, 22 Vt. 226.)

The jury found the actual damages to be \$235, and no reason suggests itself why the damages should not be trebled. (Rev. Laws, 5508.) In this regard the court is to determine whether the legislature used the word "may" in a permissive or in a mandatory sense. (36 Cyc. 1160.)

*Alfred Chartz*, for Respondent:

The appeal should be dismissed.

The time within which an appeal must be taken begins to run from the date the court made its decision and ordered judgment to be entered, though the judgment

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was not entered until later. A judgment is as final when pronounced by the court as it is when entered and recorded by the clerk as required by the statute, the entry being the ministerial act of the clerk. (*Central Trust Co. v. Holmes M. Co.*, 30 Nev. 437; *Elder v. Frevert*, 18 Nev. 283; *Twaddle v. Winters*, 29 Nev. 96.)

The judgment has been fully satisfied and accepted. (*Wedekind v. Bell*, 26 Nev. 410.)

Whether title or possession of real estate is actually involved depends upon the evidence rather than upon the pleadings, so far as the district court is concerned. (*State v. Justice Court*, 29 Nev. 191; *Schroeder v. Wittram*, 66 Cal. 640.)

The jury's answers to the special questions submitted prove that appellant was not entitled to any punitive or treble damages of any kind or nature, respondent having entered under permission, and having the right to remove said structure without compensation.

By the Court, NORCROSS, C. J.:

From the notice of appeal it appears that this appeal is taken "from that part and portion of the special order made and entered in the above-entitled action on July 29, 1914, after final judgment, and in the words following: 'The clerk of this court is ordered to enter judgment on the general verdict as rendered by the jury in favor of the plaintiff, and against the defendant, for the sum of \$236, with interest thereon at the rate of 7 per cent per annum from the 11th day of September, A. D. 1913, but without costs. Defendant's motion to strike plaintiff's cost bill from the files is granted,' and, further, plaintiff hereby appeals \* \* \* from that part of the judgment herein denying plaintiff his costs of the suit."

From the complaint it appears that this was an action to recover damages for an alleged forcible or unlawful entry upon the property of the plaintiff and an alleged malicious and wanton injury thereto. Actual damages are alleged in the sum of \$600. The judgment prayed that the damages be trebled, and that the plaintiff be

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awarded judgment for \$1,800 damages and costs of suit. The answer of defendant denied title in the plaintiff to the real property in controversy, denied the alleged forcible or unlawful entry, and alleged ownership in himself to a certain building taken and removed by defendant from the real property in question. The case came on for trial before a jury which, on the 11th day of December, 1913, returned a verdict for plaintiff for \$236 actual damages, and also returned certain special verdicts.

From an opinion and order of the district judge filed in the case upon the 29th day of July, 1914, it appears that the court denied costs in favor of the plaintiff upon the ground that the judgment was for less than \$300; that the special verdicts rendered by the jury were not inconsistent with the general verdict; and directed that judgment be entered in favor of plaintiff for the sum of \$236 with interest from the date of the verdict, but without costs; that defendant's motion to strike plaintiff's cost bill from the files is granted; and that defendant's motion for judgment and costs be denied. A formal judgment in accordance with the said order of July 29, 1914, was entered by the clerk on the 7th day of August, 1914. Notice of appeal was given, dated August 10, 1914, with an acknowledgment of service on the 11th day of August, 1914, together with a waiver of an undertaking on appeal, which was filed August 12, 1914. The statement on appeal appears, from the record, to have been served on counsel for the defendant February 1, 1915, and to have been settled by the judge on February 21, 1915. Counsel for the respondent has moved to strike the statement because not filed nor served in time. The statute in force at the time the appeal was taken provides:

"When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall, within twenty days after the entry of such judgment or order, if he or his attorney was present at the time of the making or entry thereof, or if the appeal is from a judgment based upon a verdict, and in other cases within twenty days after receiving written

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notice of the entry of the judgment or order, prepare a proposed statement, \* \* \* and shall file the same with the clerk and serve a copy thereof upon the adverse party. \* \* \*” (Rev. Laws, 5331.)

It is contended by counsel for the appellant that the statement was filed in time because no notice was served upon him of the order or judgment, as required by law. The certificate of the district judge attached to the record on appeal recites “that counsel for both plaintiff and defendant, by order of the court, were notified by letters sent by the county clerk of Douglas County, Nevada, mailed from Genoa, Nevada, on July 30, 1914, addressed to them at Reno, Nevada, and Carson City, Nevada, respectively, of the decision of the court, said decision having been rendered and filed on July 29, 1914, and that in such letters were included certified copies of said decision.”

1. It is unnecessary to enter upon a consideration of the question of the legal sufficiency of the notice of order or judgment. Counsel for the plaintiff, by the notice of appeal dated August 10, 1914, and filed August 12, 1914, acknowledged notice of the order and judgment. The filing of a notice of appeal was not only an acknowledgment of the notice, but a waiver of any other or additional notice, even assuming that the same might have otherwise been required.

2. The contention of counsel for respondent that the appeal is not properly taken because no statement was filed within time is without merit. An appeal is taken by filing the notice of appeal, and is perfected by the filing of an undertaking or a stipulation waiving such undertaking. (Rev. Laws, 5330.)

3. The objection to the statement as not having been filed in time is well taken, and, as a statement, it cannot be considered.

Two questions of law have been presented upon the appeal, and we think they may be determined upon the judgment roll alone: (a) Whether plaintiff was entitled to costs as a matter of right; (b) whether plaintiff was entitled to have judgment for treble the actual damages. Relative to the question of costs, Rev. Laws, 5377, provides:

"Costs shall be allowed of course to the plaintiff [on a verdict] upon a judgment in his favor, in the following cases: \* \* \*

"5. In an action which involves the title or possession of real estate."

4. The complaint alleged ownership in the plaintiff of certain real estate upon which was situated a certain building, the destruction or removal of which constituted the main element of damage. The answer denied ownership of the land in the plaintiff. The answer of the defendant raised an issue as to the title or right of possession of plaintiff to the real property. Under the issues made by the pleadings it was incumbent upon the plaintiff, in order to recover any judgment for damages, to establish his title or right of possession to the real property upon which the building in question was situated. (*Gibson v. Hammang*, 145 Cal. 454, 78 Pac. 953; *Coffman v. Bushard*, 164 Cal. 663, 130 Pac. 425; *Crossman v. Lander*, 3 Or. 495; *Powell v. Rust*, 8 Barb. N. Y. 567; *Bowen v. Holdredge*, 134 App. Div. 855, 119 N. Y. Supp. 199; *Grosso v. City of Lead*, 9 S. D. 165, 68 N. W. 310; *Willard v. Baker*, 68 Mass., 2 Gray, 336.)

Numerous other cases, supporting the same view, are cited in the brief of appellant.

5. As the appeal is taken in part from the order of July 29, 1914, and another part from the judgment entered on the 7th day of August following, a question arises as to what part of the record on appeal may be considered in determining the appeal from the order, and what part may be considered in determining the appeal from a portion of the final judgment. The order is not a part of the judgment roll. Assuming that an appeal can be taken directly from the order without a statement or bill of exceptions, it would seem that any error in the alleged order must be determined from the motion upon which it is based and the order itself. If this were an appeal from the order of July 29 alone, we are of the opinion that the pleadings could not be considered in connection therewith, unless embodied in a statement to be attached to the order. From the motion of

counsel for defendant of September 15, 1913, and from the order itself it cannot be determined that the order was erroneous; for neither from the motion nor from the order themselves does it appear that the question of the title of the real property was involved in the action, and, if not so involved, the order was not erroneous.

- 6-8. The appeal from the judgment, however, denying the plaintiff's costs, presents a question of law heretofore discussed, for the reason that the pleadings and judgment are a part of the judgment roll, and from the pleadings it appears that title was involved in the suit. Plaintiff is necessarily entitled to some costs, regardless of whether the court erred in striking the cost bill or not. The plaintiff is entitled to recover the fees of the clerk whether they are embodied in the cost bill or not, and to this extent plaintiff is clearly entitled to recover. (Rev. Laws, 5387.)

9, 10. We think it cannot be said that there is any error in the judgment because of failure to treble the actual damages allowed by the verdict of the jury. The pertinent portion of section 5508 of the Revised Laws reads as follows:

"If a person recover damages for a forcible or unlawful entry in or upon \* \* \* any building or uncultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed."

Penalties are not favored in the law, and we think the use of the word "may" in the statute was intended to permit, but not require, treble damages. Whether treble damages should be approved in any case would depend upon the peculiar facts of the particular case. It is doubtful whether an appellate court would, in any case, be justified in modifying a judgment so as to allow treble damages, where such damages had not been allowed by the trial court. The facts are not before us; and, as the plaintiff is not entitled to treble damages as a matter of right, it is clear that no error appears in this regard.

11. The contention that the judgment was satisfied by the payment and acceptance of the amount of damages



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Points decided

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with interest is without merit. Satisfaction was entered to the extent of amount paid, but without waiving plaintiff's right of appeal in the matter of costs. (*Coffman v. Bushard*, 164 Cal. 663, 130 Pac. 425.)

The order appealed from is affirmed. The judgment should be modified by allowing the plaintiff the clerk's costs in the court below; and, as so modified, the judgment is affirmed. Appellant is allowed his costs on appeal.

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[No. 2198]

THOMAS YOWELL, PETITIONER, v. THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO, AND E. J. L. TABER, JUDGE OF SAID DISTRICT COURT, RESPONDENTS.

[159 Pac. 632]

1. CERTIORARI—GROUNDS—WANT OF JURISDICTION—COURTS.

*Certiorari* will lie to review the erroneous assumption of jurisdiction by a district court, where a statutory step was omitted upon appealing to it from a justice court.

2. JUSTICES OF THE PEACE—APPEAL—JUSTIFICATION OF SURETIES—STATUTE.

Under Rev. Laws, 5792, providing that an appeal from a justice to a district court will be regarded as if no undertaking was given, unless the sureties, when challenged, justify after notice, etc., *held* that their justification in the prescribed manner is essential to the district court's jurisdiction, where their sufficiency was properly challenged.

3. JUSTICES OF THE PEACE—APPEAL—JUSTIFICATION OF SURETIES—STATUTE.

Where the sureties' sufficiency is not excepted to within five days, as required by Rev. Laws, 5792, the district court acquires jurisdiction, notwithstanding that two days later appellant admits due service of such exceptions before the justice has certified the case.

**ORIGINAL PROCEEDING.** Application for *certiorari* by Thomas Yowell against the District Court of the Fourth Judicial District, in and for the County of Elko, and E. J. L. Taber, Judge of said District Court, to review an order denying petitioner's motion to dismiss an appeal from a justice court. **Order sustained.**

## Argument for Petitioner

*Milton B. Badt*, for Petitioner:

This court should order the appeal dismissed, with the petitioner's costs herein incurred. The Fourth judicial district court never acquired jurisdiction of the cause or of the appeal, and erred in denying petitioner's motion to dismiss and in setting the case for trial *de novo*.

Notice of exception to sureties in the justice court was filed in due time, and due service of the notice was admitted. (Rev. Laws, 5793.) Such an admission constitutes an acknowledgment that service was made in the proper time and in the proper manner, and is conclusive. (14 Cyc. 1119; 32 Cyc. 450; *Woolsey v. Abbott*, 48 Atl. 949, 950; *Vail v. Penn. Fire Ins. Co.*, 50 Atl. 671, 672, 67 N. J. Law, 66; *Wood v. Johnston*, 96 Pac. 508; *Harmon v. Van Ness*, 67 N. Y. Supp. 563; *Fraser v. Ryan*, 4 Rich. 460; *Struver v. Ocean Insurance Co.*, 9 Abb. Prac. 23.)

The sureties having failed to justify upon notice, after service of the notice of exception, the appeal must be regarded as if no such undertaking had been given. No undertaking having been given, as provided by law, the appeal was ineffectual for any purpose. (Rev. Laws, 5792; *Wood v. Superior Court*, 67 Cal. 115, 7 Pac. 200; *McCracken v. Superior Court*, 86 Cal. 74, 24 Pac. 845; *State v. Napton*, 62 Pac. 686, 688; *Lane v. Superior Court*, 91 Pac. 405, 406; *Moffat v. Greenwalt*, 90 Cal. 368, 27 Pac. 296; *Ross v. Markham*, 5 Civ. Proc. R. 81.)

Justification of the sureties without notice to respondent has no further effect than if the sureties had not justified. (*Wood v. Superior Court*, *supra*; *Harting v. Superior Court*, 10 Pac. 514; *Barber v. Johnson*, 57 N. W. 225; *McDonald v. Paris*, 68 N. W. 739.)

The writ of *certiorari* will be granted to review orders which are not final. (*Carpenter v. Superior Court*, 19 Pac. 174; *McCracken v. Superior Court*, *supra*; *State v. District Court*, 145 Pac. 724; *State v. Superior Court*, 154 Pac. 603; *Thomas v. Hawkins*, 107 Pac. 578; *Baker v. Superior Court*, 71 Cal. 583, 12 Pac. 685; *Gibson v. Superior Court*, 83 Cal. 643, 24 Pac. 152; *Territory v. Doan*, 60 Pac. 895.)

## Argument for Respondent

*C. B. Henderson and Carey Van Fleet*, for Respondent:

The writ of *certiorari* should not be granted. According to the more modern practice, where the inferior tribunal possesses jurisdiction to hear and determine the cause, the writ will not issue until the proceeding has terminated, and then only if it appears that the tribunal has entered an illegal judgment or order. (5 R. C. L. p. 254, sec. 5; *Glennon v. Burton*, 33 N. W. 23; *People v. County Judge*, 40 Cal. 479; *In Re Gould*, 54 Pac. 273; *Schwarz v. County Court*, 23 Pac. 84; *Page v. Commercial National Bank*, 112 Pac. 820; *Wilson v. Board*, 40 Am. St. Rep. 30; *Walcott v. Wells*, 21 Nev. 52; *Sayers v. Superior Court*, 84 Cal. 642, 24 Pac. 296; *Postal T.-C. Co. v. Superior Court*, 136 Pac. 541; *Beckwith v. Superior Court*, 80 Pac. 718; *Town of Santa Monica v. Eckert*, 33 Pac. 881.)

The writ of *certiorari* is not the proper remedy. The proper remedy is a writ of prohibition. The province of the writ of *certiorari* is to review and annul, not to restrain. (*Crow Launch and Tugboat Co. v. Superior Court*, 101 Pac. 935; *Floyd v. District Court*, 36 Nev. 349; *Golden Gate Tile Co. v. Superior Court*, 114 Pac. 978; *Edwards v. Superior Court*, 115 Pac. 649.)

Under the record certified to the supreme court, as far as appears from the facts thereof, the sureties on the undertaking on appeal justified before the justice of the peace on notice, and all presumptions are indulged in favor of the order in the district court refusing to dismiss the appeal. All that the record shows is that the motion to dismiss the appeal was made and denied by the court. There is nothing in the record to overcome these presumptions. (*Linville v. Scheeline*, 30 Nev. 111; *Bergevin v. Wood*, 105 Pac. 937; *Borchard v. Board*, 77 Pac. 708.)

Any fact necessary to support the order is presumed to have been proven, in the absence of an affirmative showing to the contrary. (*Quinn v. Quinn*, 27 Nev. 175; *Gilbert v. Shaver*, 120 S. W. 833.)

Petitioner waived all right to except to the sureties on the undertaking on appeal by failing to except to the same within the five days prescribed by statute. (Rev.

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Laws, 5792; *Linville v. Scheeline, supra*; *State v. District Court*, 26 Nev. 258.)

By admitting due service of exception to the sureties, respondent did not waive petitioner's waiver of his right to except within the time prescribed by law. By an admission of due service, a party waives only defects in the service itself, and does not waive substantial rights in regard to the time of service.

The requirement that an exception must be taken within five days is jurisdictional; unless complied with, the justice would have no right to justify the same or other sureties. (*Judson v. Bulen*, 50 N. W. 484.)

By the Court, MCCARRAN, J.:

This is a proceeding in *certiorari*. Petitioner herein obtained a judgment in the justice court of Metropolis township, in Elko County, for the sum of \$100, together with costs in the sum of \$31 and attorney's fees. A notice of appeal was filed in the justice court by the defendant in the action, the party against whom the judgment was rendered, and an undertaking on appeal, with two sureties, was filed. Petitioner filed and served a notice of exception to the sufficiency of the sureties on the appeal bond. It appears from the record that the sureties on said appeal bond filed in the justice court an instrument over their signatures, entitled "Certification of Justification of Sureties." This, however, was filed without notice to petitioner, who had excepted to the sufficiency of the sureties. No further proceedings appear to have been had in the justice court on petitioner's notice of exception to the sufficiency of the sureties, and the record was certified to the district court. The matter coming up in the district court, petitioner moved to dismiss upon the ground that the court had no jurisdiction, for the reason that, the sureties upon the appeal bond having failed to justify upon notice, the appeal from the justice court had not been perfected. The motion to dismiss the appeal having been overruled, the writ of *certiorari* is invoked to review the action of the lower court in this respect.

1. The respondents herein contend that *certiorari* will not lie to review the action of the trial court in this proceeding, for the reason that the question passed upon by the district court was one in which that court might properly exercise jurisdiction; and, having passed upon the same, its action in that respect is not reviewable.

In the case of *Floyd and Guthrie v. Sixth Judicial District Court*, 36 Nev. 349, 135 Pac. 922, we had occasion to review this question, as it might be affected by a writ of *mandamus*. In that case we held that where an inferior court erroneously refuses to entertain jurisdiction on a matter preliminary to a hearing on the merits, it may be required to proceed by *mandamus*. We think the reasoning set forth there may apply with equal force where *certiorari* is relied upon to review the action of an inferior court in erroneously assuming jurisdiction. If *mandamus* is the proper remedy to require an inferior tribunal to proceed where it has erroneously divested itself of jurisdiction, manifestly *certiorari* is the proper remedy to review the action of an inferior tribunal, where it has erroneously assumed jurisdiction.

The vital question here is: Did the district court entertain a matter of which it had no jurisdiction?

It was said by this court in the case of *Andrews v. Cook*, 28 Nev. 270, 81 Pac. 304:

"When an appeal is regularly taken, the court not only has jurisdiction to try the cause upon its merits, but it has entire and complete jurisdiction of the cause for any and all purposes."

But where the appeal is not regularly taken, as where some statutory step in the proceedings has been omitted in the court of first instance, then the converse of the rule asserted in *Andrews v. Cook*, *supra*, is true, and if the district court assumes jurisdiction, its act in that respect is, in our judgment, in excess of jurisdiction, and hence reviewable on *certiorari*.

2. A very thorough and comprehensive analysis of the question at bar is presented in the case of *Hoffman v. Lewis*, 31 Utah, 179, 87 Pac. 167. In that case the Supreme Court of Utah was dealing with the identical question

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presented here, and the statute of the State of Utah is similar to ours. The court there passed upon the propriety of the writ of *certiorari* to review the action of the district court in matters of this kind. In this respect the court said:

"If the court should proceed to the trial of an appeal case where no appeal had been taken as required by law, the court would exceed its jurisdiction or power in doing so, and its act in doing so, being in excess of jurisdiction, would be reviewable on a writ of *certiorari*, upon the ground that the court presumes to act where the law withholds the right to do so."

The question here is: Did the district court erroneously invest itself with jurisdiction where, by reason of some omission of a prescribed statutory requisite, an appeal had not been perfected?

The provision of our code (section 5792, Revised Laws), having to do with the filing of an undertaking on appeal from the justice court to the district court, among other things prescribes:

" \* \* \* The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

The record in the proceeding before us discloses that, whatever attempt was made by the sureties to justify on the undertaking after exception had been filed by petitioner to the sufficiency thereof, no notice was given to or served upon petitioner.

So far as we are able to ascertain, this particular question has never been passed upon by this court. A similar statutory provision is contained in the civil practice act of other states, and the courts therein have had occasion to pass upon the identical question presented here. In the case of *Townsend Wood et al. v. Superior Court of*

*Monterey County*, 67 Cal. 115, 7 Pac. 200, the Supreme Court of California had presented in *certiorari* proceedings a question identical to the one at bar. Section 978 of the code of civil procedure of California contains a provision identical to that found in our civil practice act, section 850 (section 5792, Revised Laws). The court there held that, under such a provision, the statute was peremptory. The court said:

"Without the justification of the sureties named in the undertaking, or other sureties in their stead, upon notice to the adverse party, the appeal was not perfected, and the superior court has no jurisdiction of the case."

The expression of the Supreme Court of California in the Wood case, *supra*, was again emphasized in the case of *McCracken v. Superior Court*, 86 Cal. 76, 24 Pac. 845. In the last-named case the court, quoting approvingly from its decision in the case of *Coker v. Superior Court*, 58 Cal. 178, held that the provisions of the statute relative to the filing of notice of appeal and the perfecting of an undertaking on appeal from a justice court to the superior court were jurisdictional prerequisites, and "until all the prerequisites are completed, the appeal is not effectual for any purpose."

The district court in the matter at bar was limited in its jurisdiction to a dismissal of the appeal upon motion of petitioner. Its power to act otherwise in the proceedings had been terminated by the failure on the part of the appellant to comply with the statutory provisions in the justice court. (*Moffat v. Greenwalt*, 90 Cal. 368, 27 Pac. 296.)

In the case of *Hoffman v. Lewis*, *supra*, the court, after referring to the provisions of the statute, held that, without an undertaking as provided for in the act, there is no appeal, and a failure to have the sureties justify within the time prescribed in the statute after an exception had been filed to their sufficiency nullifies the undertaking given, and leaves the whole matter as though no undertaking had ever been made or filed.

In the case of *Bennett v. Superior Court of San Diego*

*County*, 113 Cal. 440, 45 Pac. 808, the Supreme Court of California, in a proceeding in *certiorari*, reviewing the action of the superior court in a matter quite analagous to that at bar, wherein, after an objection had been filed to the sufficiency of the sureties to an undertaking, only one of the sureties appeared to justify, held that the appeal must fail as lacking the essential requisite of a valid undertaking; and, the superior court having assumed jurisdiction, its action in this respect should be annulled.

3. The case at bar presents a condition not found in either of the authorities cited. The record discloses that prior to the filing of the petitioner's exception to the sufficiency of sureties, and seven days after the bond had been filed, the attorneys for respondent were served with the exception to the sufficiency of the sureties; and the instrument sets forth as follows:

"Due service of the within notice and receipt of a copy thereof are hereby acknowledged this 2d day of February, 1915.

[Signed] Henderson & Caine,

"J. L. Darrr,

"Attorneys for Defendant."

It is contended by petitioner that this admission of "due service" was in effect a waiver of any objection as to time. The time in which for the petitioner to except to the sufficiency of the sureties expired two days prior to the date set forth in the admission of service hereinabove quoted. The filing of the notice of appeal in the justice court by the respondents and the filing of the undertaking on appeal perfected the appeal in so far as the justice court was concerned. True, the justice court retained jurisdiction of the matter until the expiration of the time set forth by the statute in which for petitioner to except to the sufficiency of the sureties on the undertaking on appeal. When that time had expired, the appeal had been perfected; and it devolved upon the justice of the peace to certify the proceedings to the district court at once. The fact that the justice of the peace might have deferred action in certifying the proceedings to the district



court would not, in our judgment, afford opportunity for the parties in the action to proceed to do something for the doing of which the time prescribed by statute had expired.

Let us assume that immediately upon the expiration of the time in which for petitioner to have filed his exception to the sureties, and without further delay, the justice of the peace had, in compliance with the statute, certified the proceedings to the district court. Under such condition could it be seriously contended that an acknowledgment of service such as that found in the record here would afford any relief to the party filing the instrument, or would confer any authority upon the justice of the peace to proceed further in the matter after the proceedings had been by him certified to the higher court? We think not. We deem it unnecessary to dwell at length upon the proposition as asserted by petitioner that the term "due service," as used in the admission of service signed by the attorneys for respondent, constituted a waiver as to the time within which the objection should have been filed. The time within which for the petitioner to except to the sufficiency of the sureties had expired; the jurisdiction of the justice court, in so far as it might affect the proceedings other than to certify the same to the district court, had terminated; petitioner was too late with his exception to the sufficiency of the sureties, nor would any admission of "due service" of an instrument, purporting to be an exception to the sufficiency of the sureties, relieve petitioner of his tardiness.

We might have disposed of the case by a mere consideration of this particular phase as it is presented by the record, but we deem the case of sufficient importance to dwell on other phases of the case; hence our consideration and interpretation of the statute, particularly section 5792, Revised Laws.

The order of the district court in denying the motion to dismiss the appeal will be sustained.

It is so ordered.

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## Argument for Appellants

[No. 2209]

THE STATE OF NEVADA, RESPONDENT, v. R. WELLS  
AND JAMES STEELE, APPELLANTS.

[150 Pac. 520]

## 1. CRIMINAL LAW—PRELIMINARY EXAMINATION—NECESSITY—RIGHT OF ACCUSED.

Under Stats. 1913, c. 200, sec. 2, requiring, in all cases where defendant has not had or waived a preliminary examination, that there be filed with the information an affidavit verifying it upon affiant's personal knowledge, and section 9 thereof, as amended (Stats. 1915, c. 17), providing that an information may be filed after preliminary examination, or waiver of it, but if accused has been discharged on preliminary examination, or the complaint upon which the examination has been held has not been delivered to the clerk, the district attorney may file an information, upon affidavit, of any person knowing of the offense, etc., but that such affidavit need not be filed where the defendant has waived a preliminary examination or upon such examination has been bound over, one accused of crime has a right to opportunity to either have or waive preliminary examination.

## 2. CRIMINAL LAW—PLEA—NOT GUILTY—WITHDRAWAL.

A motion to set aside a plea of not guilty for the purpose of interposing a plea in abatement is addressed to the sound judicial discretion of the trial court.

## 3. CRIMINAL LAW—PLEA IN ABATEMENT—TIME AND ORDER OF PLEADING.

The objection in a plea of abatement that no preliminary hearing on the charge was had or waived, and that no leave of court was obtained for the filing of the information, should be made before plea of not guilty is entered.

## 4. CRIMINAL LAW—APPEAL—REVIEW—DISCRETION OF TRIAL COURT—REFUSAL TO ALLOW WITHDRAWAL OF PLEA.

The decision of the trial court on motion to withdraw a plea to the merits of an information for the purpose of interposing a plea in abatement will not be disturbed, where its discretion has been exercised without effecting a manifest injustice, and where there is no improper assumption of jurisdiction.

APPEAL from the Tenth Judicial District Court, Clark County; *Charles Lee Horsey*, Judge.

R. Wells and James Steele were charged with robbery. From a judgment and order denying their motion to withdraw pleas, they appeal. **Affirmed.**

*F. R. McNamee* and *Leo A. McNamee*, for Appellants:

It was error in the trial court to overrule appellants' motion for permission to withdraw their plea in order

## Opinion of the Court—McCarran, J.

that they might make a motion to have the information set aside on the ground that it appeared from the information and the affidavit attached that no preliminary hearing was had or waived, and that no leave of court was had or obtained for the filing of said information. It was the intention of the legislature that a preliminary hearing should be a prerequisite to the filing of an information, except in cases where the accused is discharged upon the hearing, or where the complaint has not been filed with the clerk, or where the preliminary examination has been waived. (Stats. 1913, c. 209; *State v. Belding*, 71 Pac. 330.)

*H. C. Price*, Deputy Attorney-General, for Respondent:

In this state, as in the United States generally, the right of prosecuting attorneys to file informations is now regulated by statute. (Stats. 1913, c. 209.)

The legislature had the right to provide for prosecutions by information without first giving the accused a preliminary examination. (*Territory v. Stroud*, 50 Pac. 255; *State v. Belding*, 71 Pac. 330; *State v. Guglielmo*, 79 Pac. 577.)

Leave of court is not necessary. (*State v. Kyle*, 56 L. R. A. 115.)

By the Court, MCCARRAN, J.:

The appellants, being charged jointly with the crime of robbery in an information filed by the district attorney of Clark County, interposed a plea of "not guilty," and thereafter moved the court for permission to withdraw their plea, in order that they might make a plea in abatement.

1. The ground upon which appellants sought to attack the information was that no preliminary hearing on the charge was had or waived, and that no leave of court was had and obtained for the filing of said information. The law of this state applicable to prosecutions and punishment of crimes, misdemeanors, and offenses, by information, is found in Stats. 1913, p. 293. Section 2 of the act provides, among other things:

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“ \* \* \* In all cases in which the defendant has not had or waived a preliminary examination there shall be filed with the information the affidavit of some credible person verifying the information upon the personal knowledge of affiant that the offense was committed.”

It is the contention of the state, as the respondent in the matter at bar, that this provision of the statute contemplates that no preliminary examination need be held, and that a defendant charged by an information might be held and put to trial upon an information without opportunity for preliminary examination. Section 9 of the act of 1913 was amended by the legislature of 1915, and, as amended, reads as follows:

“An information may be filed against any person for any offense when such person has had a preliminary examination as provided by law before a justice of the peace, or other examining officer or magistrate, and has been bound over to appear at the court having jurisdiction, or shall have waived his right to such preliminary examination. If, however, upon such preliminary examination the accused has been discharged, or the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court, the district attorney may, upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of the court first had, file an information, and process shall forthwith issue thereon. The affidavit mentioned herein need not be filed in cases where the defendant has waived a preliminary examination, or upon such preliminary examination has been bound over to appear at the court having jurisdiction. All informations shall set forth the crime committed according to the facts.” (Stats. 1915, p. 16.)

If there be any ambiguity in section 2 of the original

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act, it is clarified by section 9 as amended. The latter section, to our mind, contemplates one of two things: Either that a party accused of crime shall have opportunity for and avail himself of a preliminary examination; or, having opportunity for such preliminary examination, waives his right thereto. But that the opportunity must be afforded for a preliminary examination to one accused of crime appears to us to be the intentment of the act, especially as it is set forth in the amended section 9 of the act. The provisions of section 9, as we view it, only go to make operative and effective the provisions of the latter part of section 2. The first part of section 9 provides for the filing of an information against one who, having had a preliminary examination, has been bound over to appear at the court having jurisdiction, or who, having had opportunity for a preliminary examination, has waived his privilege in that respect. Under such conditions as this, the statute says: "No affidavit need be filed with the information." But section 9 makes provision for other conditions that might arise, as, for instance, where a party accused has had a preliminary examination and has been discharged by the committing magistrate, or where, after the preliminary examination, the affidavit or complaint upon which such examination was held has not been delivered to the clerk of the proper court. In either event an information may be filed, if it is accompanied by an affidavit of any one having personal knowledge and authorized by an order of the court having jurisdiction of the offense.

It is the contention of the state, as respondent herein, that the legislature intended that an information may be filed both where a preliminary examination was had and also where no preliminary examination took place. In our opinion, this contention may be well taken, and yet the right to a preliminary examination is one which a party accused is by the state accorded. The statute, both in section 2 and in the amended section 9, makes

waiver to a preliminary examination on the part of the party accused a condition precedent to certain things. This, to our mind, emphasizes the fact that the legislature intended that a party accused should have the right, if he saw fit, to waive his privilege of preliminary examination, but that he must have opportunity to waive such is patent. How can it be said that a party may waive a preliminary examination if the right to such preliminary is not afforded? If the right to a preliminary examination is not contemplated by the statute, why does it make provision for waiver? The answer to these propositions is conclusive that the statute contemplated the right of one accused by information to a preliminary examination.

2, 3. The motion to set aside the plea of "not guilty" for the purpose of interposing a plea in abatement, was addressed to the sound judicial discretion of the trial court. An objection such as that sought to be raised by appellants herein ought to be made before plea is entered. In the case of *State v. Collyer*, 17 Nev. 275, 30 Pac. 891, Mr. Justice Hawley, speaking for this court, said:

"If a wrong has been committed, the law intends that the party injured shall have a remedy; but where it provides the manner in which relief shall be given, the path pointed out should be followed. It is important, to the fair and impartial administration of justice, that the time for making such motions should be restricted. \* \* \* By pleading to the indictment it will be considered that he consented to the irregularity, and thereby waived his right to make any objection to the method."

To the same effect are: *State v. Roderigas*, 7 Nev. 333; *State v. Larkin*, 11 Nev. 325.

4. In the case of *State v. Collyer*, *supra*, the court took occasion to observe that in the exercise of sound judicial discretion, where the motion is made in good faith before the trial commences, it would be the better practice to allow the plea to be withdrawn and give the defendant an opportunity to make his motion to quash the indictment, especially if the court was of the opinion

## Argument for Appellants

that there was any merit in the motion. We subscribe to this doctrine in its entirety. Nevertheless, the right to withdraw a plea to the merits of an information for the purpose of interposing a plea in abatement being a matter addressed to the sound judicial discretion of the court, its decision in that respect should not be disturbed, where, in this case, such discretion has been exercised without effecting a manifest injustice and where there is not an improper assumption of jurisdiction.

The order and judgment appealed from will be affirmed.

It is so ordered.

[No. 2211]

LUIGI PICETTI, PIETRO PICETTI, AND LORENZO  
PICETTI, APPELLANTS, v. D. C. WHEELER,  
INCORPORATED, RESPONDENT.

[159 Pac. 522]

1. APPEAL AND ERROR—REVIEW—CONFLICTING EVIDENCE.

A judgment will not be reversed for insufficiency of evidence where substantial, although conflicting, evidence supports it.

APPEAL from Second Judicial District Court, Washoe County; *Cole L. Harwood*, Judge.

Suit by Luigi Picetti and others against D. C. Wheeler, Incorporated. From a judgment for defendant, plaintiffs appeal. **Affirmed.**

*Mack & Green* and *Heer & Glynn*, for Appellants:

The trial court erred in each and every particular set forth in the memorandum of errors. Judgment should have been in favor of plaintiffs as to the waters of the spring in question, and the judgment should be reversed and a new trial granted. The ruling of the court that plaintiffs had lost their right to the use of the water of the spring because it was consumed by evaporation and seepage before reaching their lands is wholly unsustained by the evidence.

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Opinion of the Court—NORCROSS, C. J.

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*LeRoy F. Pike and L. A. Gibbons, for Respondent:*

The judgment of the lower court should be affirmed, the findings and judgment being supported by the evidence, and there being no ground for reversal.

No title can be secured to mere waste or percolating and seepage water. (Kinney on Irrigation, vol. 2, p. 1160, *et seq.*)

The evidence shows that the water was used as waste water from higher land, and that there never was a real appropriation of it; simply a mere acceptance of it when it came. This does not constitute an appropriation. (*Walsh v. Wallace*, 26 Nev. 299; *Smith Canal Co. v. Colorado*, 34 Colo. 485, 3 L. R. A. n. s. 1148; *Burkhart v. Nunberg*, 37 Colo. 187, 86 Pac. 98.)

It is true that the evidence is conflicting, but it is well established that where the evidence is conflicting, the decision and findings of the lower court will not be interfered with.

Having made no request as to findings, or taken any exception thereto or to defective findings, appellants cannot be heard to complain now in regard thereto. (Rev. Laws, 5345; *Warren v. Quill*, 9 Nev. 259; *Hogle v. Lowe*, 12 Nev. 286; *More v. Lott*, 13 Nev. 380; *Wel-land v. Williams*, 21 Nev. 230; *Schwartz v. Stock*, 26 Nev. 128; *Lucas v. City*, 28 Cal. 591.)

By the Court, NORCROSS, C. J.:

This is an appeal from a judgment in favor of the defendant in an action brought by appellants, plaintiffs in the court below, for a permanent injunction restraining the defendant from interfering with certain alleged water rights of plaintiffs.

The only question urged on appeal is that the evidence does not support the judgment. The case was tried to the court below without a jury. From the opinion of Harwood, District Judge, we quote the following:

"The evidence in this case clearly showed that whatever rights the plaintiff claimed must be based upon waters having their source below the point where the



so-called Towle Ranch ditch crosses the ravine which is referred to in the pleadings and in the testimony. There is some claim that there are small springs in addition to the large one situated on the south side of the ravine, but the evidence on this point is not clear or convincing. The only clearly established source of water supply except the waste waters, to which, of course, no claim of appropriation can be made, is the large spring above referred to. This spring has a constant flow, although it varies somewhat in quantity, and the testimony establishes the fact that in the summer the flow of the spring in question is somewhat reduced, probably as low as  $2\frac{1}{2}$  or 3 inches. This spring is located a distance of about 600 yards above the plaintiff's land, and I am convinced, both from the testimony and from an inspection of the premises, which was had in company with the representatives of the parties and the parties themselves, that this small flow of water will not reach the plaintiff's land during the irrigating season. The evaporation and seepage will consume it. Undoubtedly, when this flow was added to the waste water which was used for irrigating above the spring, or that might be used for irrigating below the spring, there might have been a sufficient head of water flowing down the ravine to be available. But steps have been taken to save this waste water and carry it to other lands of the defendant company. The plaintiff has failed to make out a case with such clearness of proof and by such a preponderance of the evidence as would entitle him to a decree."

It is too well settled to require a citation of authorities, that a judgment will not be reversed for insufficiency of evidence where there is any substantial evidence to support it. The most that can be said in this case is that the evidence is conflicting. The court below not only heard the evidence, but it was the exclusive province of that court to determine the weight and credibility to be given to the testimony. In addition to hearing the testimony, the judge, in company with the respective parties, made a personal inspection of the premises in

## Argument for Petitioners

controversy. We think no good purpose could be served by entering upon a consideration of the evidence in detail. Suffice it to say we have examined the transcript and that it cannot be said therefrom that there is not substantial evidence to support the judgment.

Judgment affirmed.

[No. 2247]

IN THE MATTER OF THE APPLICATION OF PHIL A. WILLIAMS AND JAMES E. LATHROP FOR A WRIT OF HABEAS CORPUS.

[159 Pac. 518]

1. CRIMINAL LAW — PRELIMINARY EXAMINATION — SUFFICIENCY OF EVIDENCE.

Testimony on a preliminary hearing for larceny from the person, *held*, in *habeas corpus* proceedings, not to make reasonable or probable that the crime was committed by accused so as to constitute the sufficient cause necessary under Rev. Laws, 6987, for holding them to answer.

ORIGINAL PROCEEDING. Application for writ of *habeas corpus* by Phil A. Williams and another. **Writ granted**, and petitioners discharged.

*R. M. Hardy*, for Petitioners:

The petitioners should be discharged. There is absolutely no justification for the holding of defendant Williams, and nothing except suspicion upon which to hold Lathrop. The testimony taken and received at the preliminary hearing does not show, or tend to show, that petitioners committed the offense charged, or any public offense whatsoever; it does not show, or tend to show, that they committed any offense lesser than, or contained within, the offense charged, or which might be a part of the offense charged. There was a total and entire failure on the part of the state to adduce proof at the preliminary hearing, or to show sufficient cause, or any cause, to believe that the offense of larceny was committed at the time and place mentioned in the complaint, or at all, or that the petitioners were guilty

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Opinion of the Court—McCarran, J.

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thereof. The case comes within the rule of failure to show reasonable or probable cause.

*J. E. Powell*, District Attorney, and *E. T. Patrick*, Deputy Attorney-General, for Respondent:

There is no question of law raised in this case. There can be only an application of the rules to the evidence as disclosed at the preliminary examination. It is not a question of whether the testimony shows that there is sufficient evidence to convict, or even whether there is sufficient to support a judgment in case a conviction can be had. But the question is merely whether it appears to the committing magistrate that a crime has been committed, and whether there is reasonable cause to believe the petitioners guilty. (*Rev. Laws*, 6987; *Ex Parte Heacock*, 8 Cal. App. 420; *Ex Parte Molino*, 39 Nev. 360.)

By the Court, MCCARRAN, J.:

This is an original proceeding in *habeas corpus*. By the petition it appears that one Phil A. Williams and one John E. Lathrop were charged before the justice of the peace of Lake township, Humboldt County, with the crime of larceny from the person under circumstances not amounting to robbery. A preliminary examination was held, and the testimony in its entirety, as given and had at that examination, is made a part of the petition here.

The sole ground upon which petitioner relies for the release of the parties restrained of their liberty is that the evidence fails to establish reasonable or probable cause for the holding or detaining or restraining of the parties. In the recent case of *Ex Parte Molino*, 39 Nev. 360, 157 Pac. 1012, we said:

"It is not required upon a preliminary examination, in order to warrant a magistrate in holding the accused to answer, that the evidence taken as a whole be sufficient to warrant a jury in reaching a conclusion of the guilt of the accused beyond a reasonable doubt."

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Opinion of the Court—McCarran, J.

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In the matter at bar, however, we find nothing, even in the strongest evidence produced for the state, upon which reasonable or probable cause could be supported. The testimony of the complaining witness is perhaps the most direct; and yet at no place in his evidence do we find anything that would warrant the holding of the parties whose release is sought.

It appears that on the night on which the alleged offense was committed, the complaining witness had been drinking to a considerable extent. At the solicitation of Lathrop he went to the saloon conducted by the petitioner Williams. It appears that there they entered into a game of matching coin, and some money was exchanged. While there, the complaining witness exchanged coats with Lathrop; and his testimony in that respect is as follows:

"Well, he said, 'Dutch, let's change coats,' and he tried to pull it off, but I let him have my coat, and at the same time he took my coat and put it on, and he was quick; he flopped this pocketbook over the bar, but I saw him.

"Q. And where was that pocketbook before he flopped it over the bar? A. In my coat.

"Q. In your right-hand pocket, the one you have previously described? A. Yes; I don't know whether the money lost out by being flopped over the bar or not, but I said to Williams, 'You come through with this pocketbook right away,' and he reached down and gave me this pocketbook back, and I put it in my pocket, and I didn't look at it, but I think I went over to Charlie Arobio's.

"Q. Did you examine the pocketbook after the defendant Phil Williams handed it back to you? A. No.

"Q. About how long was it after the defendant Lathrop tossed it over the bar before the defendant Phil Williams handed you back the pocketbook? A. Oh, maybe I could count to five or maybe to ten. He dropped it over and I kind of looked over, and maybe I could have counted five.

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Opinion of the Court—McCarran, J.

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"Q. And you saw this pocketbook flop down on the other side of the bar, and he reached down and handed it back to you? A. Yes.

"Q. Could you see the pocketbook during any of the time after it was flopped over the bar until it was handed back to you? A. Yes, I looked over and saw it.

"Q. Where was it when you looked over and saw it? A. It was on the inside of the bar on the floor.

"Q. When did you look over the bar, before or after you spoke to Phil Williams and told him to hand it back to you? A. Well, I watched it right away. When the pocketbook flopped there I looked right away until he reached down and handed it over again. I never would have noticed, but I heard the flopping, and I said: 'Come on, I want this money back; I want this pocketbook.'

"Q. Did the defendant Phil Williams hand it to you directly after he picked it up, or was there a space of time? A. No, he kind of reached down like that (demonstrating) and came up and handed it over to me.

"Q. To the best of your judgment, then, you could have counted five? A. Yes, maybe five or ten; five anyhow.

"Q. When the defendant Lathrop asked you to change coats, what else did he say at the time, if anything? A. He didn't say much; he said, 'Let's see how your coat fits me'; he said, 'I think you and me are the same size'; and I didn't see, after he got that coat on, how he took it out, but I saw the pocketbook flop down.

"Q. You didn't see him with the pocketbook in his hand prior to the time you saw it going over the bar? A. No; I saw it the minute it flopped down."

In addition to this, the complaining witness testified that the pocketbook was handed to him by Williams and never left his possession thereafter to his knowledge.

It appears that after the incident related in the testimony of the complaining witness he went to another saloon, and there, in an intoxicated condition, was assisted to a chair by the bartender of the place. He

slept in the chair for several hours; on awakening, he attempted to buy a drink in the place, when for the first time discovered that his money was gone.

Section 6987 of our Revised Laws, applying to preliminary examinations, is as follows:

"If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the depositions and statement, an order signed by him to the following effect: 'It appearing to me by the within depositions and statement (if any), that the offense therein named (or any other offense according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within-named ..... guilty thereof, I order that he be held to answer the same.' " (Rev. Laws, 6987.)

In the case of *In Re Kelly*, 28 Nev. 491, 83 Pac. 223, this court has held that in order to justify a magistrate in holding one accused, the evidence need not show guilt beyond a reasonable doubt. We subscribe to this rule as it has been generally stated by this and other courts. But neither this rule nor any other of which we are aware goes so far as to say that the committing magistrate may hold one accused to answer where no cause appears; and in the case at bar we find nothing, as we read the record, that might be termed sufficient cause to make it either reasonable or probable that the crime of larceny from the person was committed by the parties so charged. Indeed, the circumstances surrounding the incident in the Williams saloon were not even sufficient to arouse the suspicion of the complaining witness at the very time at which the incident took place. There is testimony in the record to show that several hours after the incident in the Williams barroom the complaining witness exhibited the pocketbook to a disinterested party, and that at that time it contained a number of bills; and at that time the complaining witness, according to the record, boasted of having \$250 therein.

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Points decided

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Taking the testimony in its entirety as it is presented to us in the record, it is our judgment that there is no reasonable or probable cause sufficient to hold these parties accused, or to deprive them of their liberty.

It is the order of the court that the writ prayed for be granted and perpetuated, and that Phil A. Williams and John E. Lathrop, in whose behalf the petition is laid before this court, be discharged.

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[No. 2191]

IN THE MATTER OF THE ESTATE OF JENNIE  
LEWIS, DECEASED.

[159 Pac. 961]

1. WILLS — DEATH OF DEVISEE — RIGHTS OF HEIRS — STATUTES —  
"DEVISEE" — "DEVISE" — "LEGATEE" — "LEGACY."

Under Rev. Laws, 6219, continued practically in the form in which it was enacted in 1862, providing that when any estate shall be devised to any relative of the testator and the devisee shall die before the testator, leaving lineal descendants, they shall take such estate as the devisee would have taken had he survived the testator, and in view of the specific use of the terms, "devisees," "legacies," etc., in section 6205, and the specific and correct use of the words "devisee" and "devisor" in section 6220, and in the absence of an interchangeable or indiscriminate use of such terms in the statute, the words "devisee" and "devise" are not to be given the scope of "legatee" and "legacy," and do not comprehend the disposition of personal property; so that, where a will gave and bequeathed the residue of all property of testatrix to a relative and her daughter and the devisee predeceased the testatrix, the daughter was entitled to all the residue of the realty, and to one-half the residue of the personal property, but as to the other half of the residue of the personal property, the testatrix died intestate.

2. STATUTES — CONSTRUCTION — COMMON-LAW SENSE OF WORDS.

Where a statute uses a word which is well known and has a definite sense at common law, without specific definition, it will be presumed to be used in its common-law sense, unless it clearly appears that it was not so intended.

3. WILLS — CONSTRUCTION — "BEQUEATH" DISTINGUISHED FROM  
"DEVISE."

The word "bequeath" is generally used to express a gift of personalty made in a last will, and the word "devise" is a term generally used to express a gift of realty made by will.

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Statement of Facts

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## 4. STATUTES—CONSTRUCTION—TECHNICAL WORDS.

Technical words and phrases having peculiar and appropriate meaning in law are to be understood according to their technical import; but to such rule there is an exception where words are used to express convertible terms in a statute, and where a court, seeking to carry out the legislative will, applies to the terms the meaning that will give the most unrestricted scope to the enactment.

**APPEAL** from Second Judicial District Court, Washoe County; *R. C. Stoddard*, Judge.

In the matter of the estate of Jennie Lewis, deceased. Objections were filed to the amended petition for distribution, and from a final decree of distribution Delle B. Boyd, administratrix with the will annexed, appeals. **Decree affirmed.**

## STATEMENT OF FACTS

On the 24th day of June, 1914, Jennie Lewis, a widow, died, leaving an estate consisting of both real and personal property within the county of Washoe, State of Nevada. As to the disposition of this estate, she left a last will and testament, which last-named instrument was duly admitted to probate in the district court. The testatrix left no surviving husband, nor child, nor child or children of any deceased child; and, as appears from the record, her sole and only heirs at law were a sister, Elizabeth Johnston, a brother, Charles Johnston, and a nephew, Robert Johnston, the son and only heir of Robert Johnston, deceased brother of testatrix. The will of the deceased set forth several gifts, devises, and bequests to individuals, friends, and relatives; and section 17 of the instrument is as follows:

"All the rest and residue of my property, of every kind and character, wheresoever situated, which I may own or possess at the time of my death, I give and bequeath to Mrs. Hattie Cunningham and her daughter Hattie, residing at 2220 Webster Avenue, in the city of Mattoon, in the State of Illinois."

All matters and things essential to the due carrying out of the administration having been accomplished, the



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Statement of Facts

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administratrix with the will annexed filed her petition for the distribution of the said estate, and on the 28th day of May, 1915, filed an amended petition for distribution. In the said amended petition for distribution, it was alleged:

"That by the terms of said will Mrs. Hattie Cunningham is named as a residuary devisee and legatee, and, as this administratrix is informed and believes and alleges the fact to be, that the real name of the said devisee and legatee is Harriet B. Cunningham, and that she died prior to the death of the testatrix, Mrs. Jennie Lewis. That by the terms of said will, one of the residuary devisees and legatees named and designated therein as Hattie, the daughter of said Mrs. Hattie Cunningham, is, as this administratrix is informed and believes and alleges the fact to be, Mrs. Harriet E. Bailey, residing at No. 6845 Euclid Avenue, in the city of Chicago, State of Illinois; that she was sometimes called and known as Hattie Cunningham, and that she was known to the decedent by the name of Hattie, and that she is the only child and sole heir of said Harriet B. Cunningham, designated in said will as Hattie Cunningham. That this administratrix is informed and believes and alleges the fact to be that the said Mrs. Harriet E. Bailey is a second cousin of the said deceased, Jennie Lewis. That the next of kin of said Jennie Lewis, whom your petitioner is advised and believes and therefore alleges to be the heirs at law of said testatrix, are Eliza Johnston, a sister, residing at Sullivan, Moultrie County, State of Illinois; Charles Johnston, a brother, residing at Reno, Nevada; and Robert Johnston, whose residence is unknown, a son and only heir of Robert Johnston, a deceased brother of said Jennie Lewis, deceased."

Pursuant to the prayer of the petitioner for distribution, the court found and decreed:

"That the said Harriet E. Bailey, is entitled to have distributed to her, as a residuary devisee and as sole heir to the estate of Harriet B. Cunningham, all of the residue of the real estate belonging to the estate of said

## Argument for Appellants

Jennie Lewis, deceased. That she is entitled to have distributed to her one-half of the residue of the personal property belonging to said estate of Jennie Lewis, deceased. That by reason of the death of said Harriet B. Cunningham prior to the death of said Jennie Lewis, deceased, all the right, title, and interest bequeathed to her by said will as a residuary legatee of the estate of Jennie Lewis, deceased, lapsed, and the said Jennie Lewis, as to one-half of the residue of the personal property of her estate, died intestate."

Written objection having been filed to the amended petition for final distribution prior to the rendition of the decree, she appeals from said decree of distribution to this court.

*Hoyt, Gibbons & French, for Appellants:*

The words "devised" and "devisee," as used in section 6219, Revised Laws, should not be restricted to their narrow, old-time, common-law meaning, but should be given the later and more modern signification, including within their meaning the terms "legacy" and "legatee."

The purpose of section 6219, Revised Laws, was to prevent lapses, and the intention of the legislature was to prevent the lapsing of legacies as well as the lapsing of devises. The main purpose of the section was to prevent intestacy; and, if counsel for appellant is correct in his contention, we would be in the unavoidable position of enforcing the will as to all of the real property in the residuum and one-half only of the personal property, leaving the other one-half of the latter in the residuum to be distributed as though no will were in existence. The words "bequest" and "devise" are now used indifferently and interchangeably. (*Borquer v. Brown*, 133 Ind. 391, 33 N. E. 92; *Rountree v. Pursell*, 11 Ind. App. 522, 39 N. E. 747.) The rule prevails in the interpretation of statutes as well as of wills. (*Evans v. Price*, 8 N. E. 857; *People's Trust Co. v. Smith*, 82 Hun, 494, 31 N. Y. Supp. 522; *In Re Campbell*, 75 Pac.

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853; *People v. Petri*, 61 N. E. 499; *Logan v. Logan*, 17 Pac. 99.)

*James T. Boyd*, for Respondents:

The entire act concerning wills (Rev. Laws, 6202-6222) shows an accurate use of legal terms, the words being used in their strict legal signification. Under the common law, and all rules of definition, the term "devise" means "a disposition of real property contained in a man's last will and testament." (2 Blackstone, 372; *Anderson's Law Dictionary*, 353.)

The courts will construe and define words in their ordinary meaning, unless it clearly appear that a different intention existed. "Where a statute uses a word which is well known and has a definite sense at common law, without defining it, it will be presumed to be used in that sense, and will be so construed, unless it appears that it was not so intended." (*Sunderland*, vol. 2, sec. 398; *In Re Ross*, 140 Cal. 283.)

Unless it clearly appear that the legislature used the terms "devise" and "bequeath" interchangeably, or that they were intended to have a different meaning from that ordinarily given them, the court will give them the definition which they have in law. (*Lasher v. Lasher*, 13 Barb. 106; *Logan v. Logan*, 17 Pac. 99; *Woerner*, vol. 2, sec. 413.)

The most casual examination of the entire statute relating to wills will convince the court that the legislature used the language in its exact meaning; and under well-established rules, universally followed by all courts, the word "devise," as used in the statute, refers solely to lands.

By the Court, MCCARRAN, J., after stating the facts:

1. It may, we think, be properly stated that but one question is presented in this appeal, and that a question of construction and application of a statutory provision.

The law of this state concerning wills was enacted by the legislature of 1862, and, with but one slight

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exception, has remained since unamended, and is handed down to us in our Revised Laws practically in its original form and verbiage. Our law in this respect is found from sections 6202 to 6222, inclusive, Revised Laws of 1912. It is with section 18 of the act (section 6219, Revised Laws) that we have to deal in the matter at bar:

“When any estate shall be devised to any child or other relation of the testator, and the devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate so given by the will, in the same manner as the devisee would have done if he would have survived the testator.”

Under the provisions of this statute, we are asked the question: Did Harriet B. Cunningham, or Harriet E. Bailey as she is now known, as the daughter of Hattie Cunningham, deceased, a beneficiary under the will of Jennie Lewis, take that part of the residue of the estate of Jennie Lewis consisting of personal property which would have passed to her mother had the latter survived the testatrix?

Appellant here, while admitting that the word “devise,” or “devised,” as used in the statute at common law and in ordinary acceptance, applies to real property, yet contends that what they term a “more modern meaning” should be applied, so that the term should also comprehend the disposition of personal property. In other words, appellant takes the position that the words “devised” and “devisee” should be given such a scope of meaning as to include that comprehended by the words “legacy” and “legatee.” In furtherance of the contention they refer us to a line of decisions where courts have announced that view.

In the case of *Rountree, Administratrix, v. Pursell et al.*, 11 Ind. App. 522, 39 N. E. 747, it was held that the word “devise” usually relates to real estate acquired through a will; that it is a gift by will of real estate, and cannot be applied with legal precision to personal

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property. A bequest, on the other hand, is a gift by will of personal property; but, says the court:

"In order to favor the manifest intent of the testator, \* \* \* the courts often construe the word 'bequest' to mean 'devise,' and 'devise' to mean 'bequest.'"

The reasoning there followed by the court might have proper application where, as in the State of Indiana, the legislature had used the terms "devise" and "bequeath" or "bequest" and "devise" more or less indiscriminately or interchangeably, at least to such an extent that the court was justified in saying that:

"Whilst some confusion exists in the terms used, we think it clear that the enactment governs the descent of real estate as well as the distribution of personalty. This much is clear: That when personal property has reached that point when the law undertakes to divide it among the persons entitled to it, it shall be divided in the same manner and into the same parts, and to the same persons that real estate is divided when it descends. We have no other statute in this state regulating the distribution of the surplus of the estate of an intestate. And we have no other enactment regulating the descent of the real estate of an intestate. Descent and distribution are combined in the same act."

In the case of *Logan v. Logan*, 11 Colo. 44, 17 Pac. 99, the Supreme Court of Colorado had under consideration the question here presented, and there held that "legacies and bequests" as used in the statute embraced "devises." It will be noted, however, that the court in arriving at this conclusion did so by reason of the acts of the legislature of the State of Colorado and an indiscriminate use of the terms by that body. The court said:

"Our legislature has not always used these words in their strict legal sense, which fact of itself would authorize us to inquire in what sense they were employed in the present instance. Section 3481, Gen. St., empowers testators to devise all their estate in 'lands, tenements, hereditaments, annuities, or rents

charged upon or issuing out of them, or goods and chattels and personal estate of every description whatsoever, by will or testament.' ”

. The court concludes its reasoning in the following:

“No violence is done by giving the words referred to the enlarged application which the authorities above referred to hold to be admissible, and which the framers of these statutes have themselves applied.”

What was the intention of our legislature when it used the words “devised” and “devisee” in section 6219?

It will be noted that in section 4 of the act (section 6205, Revised Laws, 1912) the terms “devises,” “legacies,” and “gifts” are specifically made use of. In section 19 of the act (section 6220, Revised Laws, 1912) we find the legislature making specific and correct use of the words “devisee” and “devisor.” Nowhere in the act do we find an interchangeable or indiscriminate use of the terms here referred to, but in each instance the terms appear to be correctly used, and used in the same sense as was customary at common law.

2. Where a statute uses a word without specific definition which is well known and had a definite sense at common law, it will be presumed to be used in its common-law sense, and will be so construed unless it clearly appears that it was not so intended. (2 Lewis’s Sutherland, Stat. Const., 757, 2d ed.)

3. It will not be gainsaid, we apprehend, that the word “bequeath” is one generally used to express a gift of personalty made in a last will or testament. The word “devise” is a term generally used to express a gift of realty made by last will or testament. That these terms have been by the courts construed in some instances to have interchangeable significance takes sanction rather from the use made of the terms by the legislative bodies of the respective states where such construction has been applied. (*In Re Campbell’s Estate*, 27 Utah, 361, 75 Pac. 851; *Evans v. Price*, 118 Ill. 593, 8 N. E. 854.)

4. It is, we think, a general principle that technical

words and phrases having peculiar and appropriate meaning in law shall be understood according to their technical import. This rule, however, has its exception where words are used to express convertible terms in a statute, and where a court, seeking to carry out the will of the legislative body, applies to the terms the meaning that will give the most unrestricted scope to the enactment.

In the case of *Desloge v. Tucker*, 196 Mo. 587, 94 S. W. 283, the Supreme Court of Missouri, having under consideration the force and effect of a statute wherein it was provided that, on filing of petition for sale of real estate of a decedent, notice be published, provided, that where the heirs or "devisees" are residents of the county, notice shall be served on each, held, that the word "devisees" does not include legatees.

The statute of the State of California, as enacted in 1872 and for many years prevailing in that state, was quite analogous to our statute here under consideration. (Section 1310, Civil Code of California, 1903.)

In the *Matter of the Estate of Ross*, 140 Cal. 288, 73 Pac. 978, the supreme court of that state held that the statute did not apply to legacies, but simply to devises. There the court took occasion to remark:

"In the whole chapter on Wills (Civ. Code, secs. 1270-1377) the legislature has, with extreme care and technical accuracy, used the terms 'devise' and 'legacy' in their well-recognized common-law sense and distinction; the one as a testamentary disposition of land, the other a like disposition of personalty."

The court referred to the intendment of the legislature as made manifest by the several sections of the act wherein the terms "devise" and "devisee" and "legacy" and "legatee" were used "with legal exactness," and hence with the intention to employ them precisely as defined at common law. In that case the court applied the rule which we think applicable to the matter at bar:

"Where clear, direct, and explicit terms are used by the legislature, which have had a definite meaning since

## Opinion of the Court—McCarran, J.

the beginning of common-law terminology, there can be no room for discussion as to their meaning. Time has marked them too distinctly not to be clearly recognized and understood."

The court in that case commented on the fact that the legislature should have limited the application of section 1310 to devises alone, and refers to the fact that the act concerning wills as passed by the first session of the legislature of the State of California in 1850 set forth this section the same as it stood in the code in 1903.

It may not be out of place to remark here parenthetically that, inasmuch as many of the members of our territorial legislature of 1862 were former residents of the State of California, and as much of the statute law found to have been enacted by that session had its prototype in the State of California, it is not unreasonable to suppose that this section was taken, in substance, at least, from the statute of that state.

The decision of the Supreme Court of California in the *Matter of the Estate of Ross* was followed by a specific enactment of the legislature of the State of California, wherein the statute passed upon in that case was amended in 1905, and section 1310 of the Civil Code of California now reads:

"When any estate is devised or bequeathed to any child, or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee or legatee would have done had he survived the testator."

In the *Matter of the Estate of Claus Spreckels* (Coffey's Prob. Dec. vol. 5, p. 348), Judge Coffey, referring to the original as well as to the amended statute of the State of California, commenting on the decision of the Supreme Court of California in the Ross case, *supra*, emphasized the assertion that the statute of California as it stood at the time of the decision in the Ross case admitted of no other construction, inasmuch as the use of the terms "devise" and "devisee," "legacy" and "legatee,"



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all through the chapter on wills with legal exactness exhibited the intention of the legislature to employ them precisely as defined at common law, and hence the word "devise" as used in the former statute of California in the chapter pertaining to wills applied only in its common-law acceptance, and hence affected realty rather than personalty.

We are asked to give to the word "devise" a more modern significance, in order that it may apply interchangeably with the word "bequeath." Indeed, if we had the power of legislation, we might so declare, but such function is not ours. While we may be at a loss to know why the act of the legislature was so worded, we cannot change the words or alter the policy. It has stood all of these years unamended, and we are bound to construe the term in accordance with the intendment of that branch of the government as best we may ascertain that which was the intendment.

The authorities found on the subject are quite well divided; the one line holding strictly to a common-law interpretation of the terms here involved; the other, giving the terms interchangeable significance, base their reasoning upon the intention of the legislature as expressed in the several legislative enactments.

As was indicated in the Ross case by the Supreme Court of California, so here we may say, if our legislature by the language used in the act pertaining to wills had used the terms "devise" and "bequeath" indiscriminately or with interchangeable meaning, we would be inclined to follow that line of decisions which holds that the term "devise" may comprehend a conveyance by will of personalty as well as realty. But the legislative intendment is our lodestar in applying and construing statutory enactments, and we find nothing in this statute that would cause us to believe that the legislature used the term in other than its common-law significance.

The decree of the lower court must be affirmed.

It is so ordered.

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## Points decided

[No. 2207]

**BOARD OF COUNTY COMMISSIONERS OF NYE COUNTY, APPELLANT, v. HENRY SCHMIDT AND RUSSELL WILLIAMS, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THE TONOPAH HARDWARE COMPANY, RESPONDENT.**

[157 Pac. 1073]

**1. LICENSES—POWER TO LICENSE OR TAX—STATUTE—"UNINCORPORATED TOWNS."**

The proviso to Stats. 1881, c. 48, added by Stats. 1889, c. 43, reading that in all unincorporated cities and towns the board of county commissioners shall have power to fix and collect a tax upon certain businesses and amusements, and none other, does not apply to towns which established their form of government after the unincorporated town act (Stats. 1879, c. 98), had been repealed by Stats. 1887, c. 43, or to towns which, by reason of their having a voting population of 600 or more, *ipso facto* come under the general town government act, the term "unincorporated towns" not referring to all towns within the state not incorporated; as to give it such an interpretation would nullify the grant by the legislature in the body of the act of power to boards of county commissioners to levy and collect a license tax upon numerous specific businesses, but referring specifically to towns which have assumed a form of town government under the act of 1879 entitled "An act to provide for the government of unincorporated towns in this state."

**2. STATUTES—CONSTRUCTION.**

In construing a statute the court must avoid an interpretation which will result in absurd consequences.

**3. STATUTES—CONSTRUCTION.**

Legislative acts should be construed so as to make all parts thereof harmonious, if a reasonable construction can accomplish the result.

**4. STATUTES—CONSTRUCTION.**

Where the legislative body manifests a definite purpose in an act, it will be presumed that in furtherance of such purpose the lawmaking power formulated the subsidiary provisions in harmony therewith.

**5. STATUTES—CONSTRUCTION.**

It will not be assumed that one part of a legislative act will make inoperative or nullify another part of the same act, if a different and more reasonable construction can be applied.

**6. STATUTES—CONSTRUCTION.**

In construing statutes courts must presume a legislative intentment of reasonable operation of all parts of the act.

**APPEAL from the Fifth Judicial District Court, Nye County; Mark R. Averill, Judge.**

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Argument for Appellant

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Action by the Board of Commissioners of Nye County, acting for the use and benefit of the inhabitants of the town of Tonopah, against Henry Schmidt and another, copartners doing business under the firm name and style of The Tonopah Hardware Company. From a judgment and order for defendants, plaintiff appeals. Judgment and order **reversed**, and cause remanded, with instructions that judgment be entered for plaintiff. [Petition for rehearing pending.]

*J. A. Sanders*, District Attorney of Nye County, and *E. P. Carville*, District Attorney of Elko County, for Appellant:

Statutes are to be construed, if possible, so as to give effect to every word, clause, and sentence.

In construing the statutes, reference may properly be had to extrinsic facts and circumstances, such as legislation on the subject, both prior to and contemporaneous with that in question, general facts within knowledge at the time of the legislative enactment, and also the result that would follow the different probable constructions of the act in question; also the construction given the act by those trades and occupations affected, as well as to the length of time of the acquiescence of such trades and occupations in the construction given the act by those whose duty it was to enforce it.

In the interpretation of a statute, the meaning on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail. If the principal object of the act can be accomplished and stand, under the restriction of the saving clause or proviso, the same is not to be held void for repugnancy. The proviso, if it can be termed a proviso in the sense of a legislative enactment, and the body of the act are in conflict with each other, There is an irreconcilable repugnancy between the two. It is impossible to give effect to both the body of the act and the proviso. Where a proviso in an act is inconsistent with the purview, the latter must prevail. (*Penick v. High Shoals Mfg. Co.*, 38 S. E. 973; 1 Blackstone, 195; Sedgwick, St. and Const. Law, 47.)

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Opinion of the Court—McCarran, J.

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*Wm. Forman*, for Respondent:

The appeal is without merit, and the judgment and decision of the lower court should be affirmed.

The power of the county commissioners to collect licenses is limited to the kinds of business enumerated in the proviso added to subdivision 9 of section 1 of "An act providing for the government of cities and towns in this state," and the act amendatory thereto. (Stats. 1881, p. 68; Stats. 1889, p. 43; *Griswold v. Board of County Commissioners*, 23 Nev. 183.)

The *Griswold* case was decided in 1896. In 1903 the legislature recognized and accepted the construction placed upon the act by the supreme court, and amended the provision by adding thereto certain businesses. (Stats. 1903, p. 57; Rev. Laws, 877.) Some of the businesses added were already a part of subdivision 9, but not in the proviso as it stood prior to the amendment. The legislature having adopted and ratified the construction placed upon the statute in the *Griswold* case, and the business engaged in by respondent not being among those which the board of county commissioners is given authority to license, the lower court properly held void the ordinance in question, in so far as it requires a license of respondent.

By the Court, MCCARRAN, J.:

This action involves the imposition of a license tax upon the business of respondent, to wit, retail hardware, in the town of Tonopah, Nye County, Nevada. The appellant herein, the board of county commissioners of Nye County, acting as a board of town commissioners for the town of Tonopah, brought suit to collect a license tax on the business conducted by respondent, under an act of the legislature of 1881 entitled "An act providing for the government of the towns and cities of this state." Subdivision 9 of section 1 of the act as originally passed in 1881 invested the board of county commissioners, sitting as a board of town commissioners, with powers as follows:

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Opinion of the Court—McCarran, J.

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"To fix and collect a license tax on, and regulate all places of business and amusement so licensed, as follows, to wit: Artisans, artists, assayers, auctioneers, bakers, bankers, barbers, billiard tables, boilermakers, boot and shoemakers and cobblers, bowling alleys, brokers, factors and general agents, commission merchants, circus, caravan or menagerie, concerts and other exhibitions, dance houses, saloons or cellars, express and freight companies, foundries, gaming, hawkers and peddlers, hay yards, wagon yards and corrals, hotels, boarding houses and lodging houses, illuminating gas, electric light, insurance agents, job wagons, carts and drays, laundries, livery and sale stables, lumber yards, manufacturers of liquors and other beverages, manufacturers of soap, soda, borax or glue, markets, merchants and traders, milliners and dressmakers, newspaper publishers, pawnbrokers, restaurants and refreshment saloons, barrooms, shooting galleries, skating rinks, solicitors, drummers, mercantile agents, stages and omnibuses, stockbrokers, tailors, clothes cleaners, telegraph companies, theaters, melodeons, undertakers, wood and coal dealers, having due regard to the amount of business done by each person or firm so licensed; to license, tax and regulate, prohibit and suppress all tippling houses, dram shops, public card tables, raffles, hawkers, peddlers, and pawnbrokers, gambling houses, disorderly houses, and houses of ill fame; to levy and collect an annual tax on all dogs owned or kept within the limits of said town or city, and to provide for the extermination of all dogs for which such tax shall not have been paid, and to prohibit the keeping of hogs or the running at large of goats, cows or other animals within the limits of said town or city; to fix and collect a license tax upon all professions, trades or business within said town or city not heretofore specified." (Stats. 1881, p. 69.)

The legislature of 1889 amended this section by adding thereto a proviso as follows:

"*Provided*, that in all unincorporated cities and towns in this state the boards of county commissioners shall

have power to fix and collect a tax upon the following places of business and amusements, and none other, as follows, to wit: Circus, caravan or menagerie, concerts, theatrical performances, melodeons and other exhibitions, dance houses, wholesale liquor merchants, brewers, manufacturers of liquors and beer, saloons, bars, barrooms or cellars, gaming and gambling houses, hawkers and peddlers, junk shops, pawnbrokers, auctioneers, solicitors, drummers and mercantile agents; to levy and collect an annual tax on all dogs owned or kept within the limits of said town or city, and to provide for the extermination of all dogs for which tax shall not have been paid, and to prohibit the keeping of hogs or the running at large of goats, cows, or other animals within the limits of said town or city; to fix and collect a license tax upon all professions, trades, or business within said town or city not heretofore specified." (Stats. 1889, p. 45.)

The legislature of this state, in its efforts to assist communities in establishing and maintaining a form of organized government suitable to conditions, has from time to time enacted statutes for that purpose. It might be said that four classes of town government have been created within our state by our several legislative acts (we use the word "classes" here, not in its strict sense, but for the purpose of exemplification only):

First—That class which by legislative enactment was permitted to petition the board of county commissioners for the application of the town government act, such petition being required to be signed by a majority of the voting population, representing three-fifths of the taxable property. (Stats. 1873, 1879, 1881.)

Second—Unincorporated towns, securing town government by a petition of a majority of the taxpayers representing a majority of the taxable property. (Stats. 1879, p. 103.)

Third—Disincorporated towns, *ipso facto* coming within the provisions of the statute of 1881. (Stats. 1881, p. 78, sec. 16.)

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Fourth—Towns having a voting population of 600 or more, *ipso facto* coming under the provisions of the statute of 1881 as amended in 1887. (Stats. 1881, as amended by Stats. 1887, p. 117.)

By referring to the Statutes of 1879 we find that the term “unincorporated towns” was first mentioned; and the avenue by which this class of towns could secure town government was by a petition signed by a majority of the taxpayers, representing a majority of the taxable property.

The legislature of 1881, when it enacted the statute entitled “An act providing for the government of towns and cities of this state,” sought, as we view it, to repeal the statute of 1879 applying to unincorporated towns, save and except in so far as such act might have been taken advantage of prior to the approval of the act of 1881. In this respect it will be noted that section 17 of the act of 1881 provides:

“An act entitled ‘An act providing for the government of the towns and cities of this state,’ approved February twenty-first, eighteen hundred and seventy-three, and all other acts and parts of acts in conflict with the provisions of this act, are hereby repealed; *provided*, that any town which has availed itself of the provisions of an act entitled ‘An act to provide for the government of unincorporated towns in this state,’ approved March eighth, eighteen hundred and seventy-nine, and elects to remain under the provisions thereof, may continue its government thereunder, and the provisions of said act, in respect to such town, shall remain in full force.” (Stats. 1881, p. 78.)

From this section we deem it reasonable to assume that prior to the approval of the act of 1881 certain towns had taken advantage of the provisions of the act of 1879, which act created what we have styled here government for unincorporated towns within this state. In 1887 the legislature passed an act which in specific terms provided:

“An act entitled ‘An act to provide for the government

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of unincorporated town in this state,' approved March 8, 1879, is hereby repealed." (Stats. 1887, p. 51.)

Here was a specific repeal of the act of 1879 creating the unincorporated town government. If any towns had taken advantage of the act of 1879—and we must reasonably infer, in view of the repealing clause of the act of 1881, that there were at least some towns which had taken advantage thereof—these towns were, by the specific repealing act of 1887, left without any form of town government, except in so far as other acts might affect them.

In 1889 our legislature, looking toward the class of towns which had taken their government from the unincorporated town act of 1879, amended the general town government act, as then in existence, by adding the proviso to subdivision 9 of section 1, which proviso was intended by the legislature to apply to that class of towns known as unincorporated towns, government for which had been provided by the act of 1879, and which latter act had been specifically repealed in 1887.

The trial court found, and its finding in this respect is not questioned here, that the town of Tonopah assumed its government by reason of its having a voting population of 600 or more. This being true, it takes its form of government from the general town government act as enacted in 1881, and as amended in 1887, 1889, and 1903.

1. As we view it, the proviso added by way of amendment to subdivision 9 of section 1 of the act of 1881, applying, as it does, specifically to that class of towns which adopted their town government under the unincorporated town act of 1879, could not apply to towns which established their form of government after the unincorporated town act of 1879 had been repealed by the act of 1887. The proviso found in subdivision 9 of section 1 of the act of 1881 does not apply to towns which by reason of their having a voting population of 600 or more *ipso facto* come under the general town government act.



It is the contention of respondents here, and indeed their contention in this respect found favor in the court below, that the term "unincorporated towns," as found in the proviso in subdivision 9 of section 1, refers to all towns in the state not incorporated. If this were true, the proviso "that in all unincorporated cities and towns in this state the boards of county commissioners shall have power to fix and collect a tax upon the following places of business and amusement, and none other," would defeat the spirit and intent of the first part of the subdivision, that which precedes the proviso, and which confers upon the board of county commissioners the power to fix and collect a license tax upon all places of business and amusement enumerated therein.

2. A common rule of statutory construction requires the court to avoid interpretation that will result in absurd consequences. It will be seen at a glance that the term "unincorporated towns," if given the meaning and significance contended for by respondent, would include all the other three classes of towns created by the several acts of the legislature to which we have referred, and thus the first part of subdivision 9 preceding the proviso would be nullified by that which followed the proviso, and which was added by way of amendment. This, we think, would create a most absurd situation, and one which we deem unwarranted in the light of legislation enacted upon the subject, reference to which we have made.

3. Legislative acts should be construed so as to make all parts thereof harmonious, if a reasonable construction can accomplish this result. (Lewis's Sutherland, Stat. Const., vol. 1, p. 708.)

4. Viewing the several acts of the legislature upon the subject of town government, we find a definite purpose carried out in each of the several acts. One definite object sought to be accomplished by the legislature in the enactment of the general town government act of 1881 was to confer upon the board of county commissioners powers to levy license tax, having in view the

fact that such was necessary to the institution and maintenance of such a government. Where the legislative body manifests a definite purpose, it will be presumed that, in furtherance of this definite purpose, the lawmaking power formulated the subsidiary provisions in harmony therewith. It would, we think, do violence to this principle to say that the legislature of this state, after having conferred the power to levy and collect license tax upon numerous specific businesses, would, in the same act, and, indeed, in the same section, nullify the intendment which it sought to carry out.

5. It will not be assumed that one part of a legislative act will make inoperative or nullify another part of the same act, if a different and more reasonable construction can be applied. (Lewis's Sutherland, Stat. Const., vol. 2, p. 732.)

6. As well stated by the author of the work last cited: "The law will not allow a revocation or alteration of a statute by construction when the words may have their proper construction without it."

Courts in construing statutes must presume a legislative intendment of reasonable operation of all parts of the statute.

Following these simple canons of construction, we are thereby precluded from the idea that when the legislature enacted the proviso to subdivision 9 of section 1 it intended to do an absurd thing, namely, to nullify the broader provisions of the section which precede it.

We note that neither in the proceedings in the court below nor in the written opinion filed by the learned judge of that court is any reference made to the specific repealing act of 1887, which act repealed the unincorporated town government act of 1879. This act is neither indexed in the Statutes of 1887 nor is it carried forward into the Revised Laws of 1912. We assume that its existence was not brought to the attention of the trial court, and, indeed, it might have been easily

overlooked. We think its existence, however, clarifies the situation so as to make it manifest that the provisions of the act repealed could not apply to the government of the town of Tonopah; the latter having come into existence many years thereafter.

The term "unincorporated towns" was one created by legislative enactment. It was a term intended to apply to the establishment of town government for certain communities which, acting under the provisions of the statute of 1879, petitioned the board of county commissioners that the act might become operative. In our judgment, it is clear that the term "unincorporated towns," as used in the proviso to subdivision 9 of section 1, referred specifically to those towns which had assumed a form of town government under the act of 1879 entitled "An act to provide for the government of unincorporated towns in this state."

The limitation established by the proviso to subdivision 9 of section 1 does not apply to the town in which respondent's business is conducted. By virtue of that part of subdivision 9 of section 1 which does apply to the town of Tonopah by reason of the class in which that town belongs, authority is conferred to impose a license tax upon the class of business conducted by respondent.

The judgment and order appealed from are reversed and the cause remanded with instructions that judgment be entered for plaintiff.

It is so ordered.

[Petition for rehearing pending.]

## Argument for Appellant

[No. 2113]

PETER STAMPE JENSEN, JENS SONDERGAARD  
JENSEN, AND HENRY ANDERSON, RESPON-  
DENTS, v. MARTIN PRADERE, APPELLANT.

[159 Pac. 54]

## 1. ANIMALS—TRESPASS—MEASURE OF DAMAGES.

In a trespass action for grazing sheep upon plaintiffs' land, the damages may be calculated upon the reasonable value of pasturage, where the land was used only for such purposes.

## 2. APPEAL AND ERROR—REVIEW—FINDINGS—CONCLUSIVENESS.

A judgment will not be reversed where there is substantial evidence to support it.

## 3. ANIMALS—TRESPASS—ACTIONS—ATTORNEY'S FEE—STATUTE.

Under Rev. Laws, 2336, providing that live stock grazing on another's land shall be liable for damages, costs, and an attorney's fee, *held* that a personal judgment for the attorney's fee cannot be rendered against the owner of the stock.

APPEAL from Second Judicial District Court, Washoe County; *L. N. French*, Judge.

Action by Peter Stampe Jensen and others against Martin Pradere. Judgment for plaintiffs, and defendant appeals. **Affirmed as modified**, MCCARRAN, J., dissenting.

*James T. Boyd*, for Appellant:

The judgment cannot be sustained, and should be reversed.

The court had no authority to render a judgment *in personam* against appellant for an attorney's fee. The judgment for damage is based upon a contract and not for a tort; consequently it is outside the issue and not supported by the pleadings. The damages, even if they could be supported by the pleadings, are excessive.

"A judgment must be supported by the pleadings. A complaint for a tort will not support a judgment for contract." (Black on Judgments, sec. 183; 23 Cyc. 817, 818; *Lehman v. Schmidt*, 87 Cal. 18; 11 Ency. Pl. & Pr. 894; *Carson River L. Co. v. Bassett*, 2 Nev. 249.)

Under the pleadings the measure of damage was the value of the grass at the time of the alleged destruction. (*Thompson v. Chicago, B. & Q. R. Co.*, 23 L. R. A.

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Argument for Respondents

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n. s. 310; *Risse v. Collins*, 87 Pac. 1006; *Pyramid L. & S. Co. v. Pierce*, 30 Nev. 237.)

The lower court had no jurisdiction or authority to award plaintiff an attorney's fee. The only authority that can be found for awarding an attorney's fee in an action for damages for a trespass is found in the act of 1893 (Rev. Laws, 2335, 2336), and that contemplates an action against the offending live stock, not a judgment against the owner.

*Summerfield & Richards*, for Respondents:

The judgment and order appealed from should be affirmed.

The general scope of the action is apparent by a bare perusal, namely, that it is unlawful to herd or graze live stock upon the lands of another, and that the offending party shall be liable for damages, including costs and attorney's fees, in a personal action, as has been laid down by this court. (*Dangberg v. Ruhenstroth*, 26 Nev. 453.)

It has become the rule of decision that verdicts of juries and judgments of courts will not be lightly cast aside because, perchance, they may be wrong; but every intendment will be indulged to support them, even in the face of a conflict of the evidence when the jury and the court have acted upon it. This rule springs from necessity. Without it social order would be but a name, and would be supplanted by chaos and confusion. (*Champion v. Sessions*, 2 Nev. 271; *Nosler v. Haynes*, 2 Nev. 53; *Lady Bryan Co. v. L. B. M. Co.*, 4 Nev. 414; *Mitchell v. Braumberger*, 2 Nev. 345; *Schwartz v. Stock*, 26 Nev. 143; *Simpson v. Williams*, 18 Nev. 435; *Torp v. Clemons*, 142 Pac. 1116.)

Appellant does not attempt to point out wherein the damages are excessive; and, in any event, he cannot be heard to complain of the findings, having made no exception thereto in the lower court. The doctrine of implied findings obtains in this state; and in the absence of objection as prescribed by law, even in the face of

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defective findings, or of no findings at all, the judgment will be upheld. (Rev. Laws, 5345.)

It was neither alleged, found, nor adjudged that the parties, expressly or impliedly, agreed to anything, or expressly or impliedly undertook to perform an oral or written agreement. The tort was alleged and found, and judgment made and given thereon. (*Carson River L. Co. v. Bassett*, 2 Nev. 253; *Knickerbocker v. Hall*, 3 Nev. 197; *Dickson v. Ahern*, 19 Nev. 426; *Assumpsit*, 4 Cyc. 319, *et seq.*; *Contracts*, 9 Cyc. 242, *et seq.*)

If there is no authority in law for a judgment *in personam* for attorney's fees, the same objection could be made as to costs and general damages. If the contention of appellant is correct, the proceedings should have been *in rem*, not only for attorney's fees and costs, but for the damages as well. The question has already been passed upon by this court. (*Dangberg v. Ruhenstroth*, *supra*; *Chandler v. Hanna*, 73 Ala. 390; *Dickinson v. Van Womer*, 39 Mich. 141; Rev. Laws, 5147, *et seq.*; 1 Cyc. 730, *et seq.*)

By the Court, COLEMAN, J.:

This is an action to recover damages in the sum of \$5,000 for trespass upon certain lands by the sheep of appellant, and for costs and attorney's fees. Judgment was rendered in favor of the plaintiffs in the sum of \$540, together with costs of suit, and \$350 as a reasonable attorney's fee.

While appellant assigned several errors as grounds for reversal, only three of them were argued; hence we will treat those not argued as waived.

1. The first assignment which we will consider is the one to the effect that the action was brought for a tort, but that the judgment rendered was based upon an implied contract. The theory upon which this assignment is urged is that the court, in determining the amount of damage sustained by plaintiffs, fixed it at a sum equal to what it was reasonably worth to pasture the sheep. No case has been called to our attention

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where the method of arriving at the amount of damage sustained under similar circumstances was discussed, and the only ones that we have found are those of *Tex. & Pac. Ry. Co. v. Ervay*, 3 Willson, Civ. Cas. Ct. App. sec. 48, p. 73, and *Tex. & Pac. Ry. Co. v. Land*, 3 Willson, Civ. Cas. Ct. App. sec. 51, p. 75. In those cases it was held that, the land having been used for pasturage only, evidence of its reasonable value for such purpose would be proper. Since the land which was trespassed upon by defendant's sheep was used for pasturage only, we are of the opinion that the finding of the court sustained the pleadings and the judgment. While this question was not before the court in the case of *Pyramid L. & S. Co. v. Pierce*, 30 Nev. 237, 95 Pac. 210, the method of establishing the amount of damage was the same as in the case at bar.

2. It is also urged that the evidence does not support the judgment. This court has time and again held, as have the courts generally, that a judgment will not be reversed on that ground where there is substantial evidence to support it. From a consideration of the entire evidence, we are unable to say that there is not substantial evidence to support the judgment. In view of the character of the evidence in this case, it is impossible to quote from it with any degree of satisfaction, and to quote it at length is out of the question.

3. It is also asserted that that portion of the judgment awarding plaintiffs \$350 as an attorney's fee is erroneous. The court allowed an attorney's fee pursuant to section 2336 of the Revised Laws of Nevada, which reads:

"The live stock which is herded or grazed upon the lands of another, contrary to the provisions of the first section of this act, shall be liable for all damages done by said live stock while being unlawfully herded or grazed on the lands of another, as aforesaid, together with costs of suit and reasonable counsel fees, to be fixed by the court trying an action therefor, and said live stock may be seized and held by writ of attachment

issued in the same manner provided by the general laws of the State of Nevada, as security for the payment of any judgment which may be recovered by the owner or owners of said lands for damages incurred by reason of a violation of any of the provisions of this act, and the claim and lien of a judgment or attachment in such an action shall be superior to any claim or demand which arose subsequent to the commencement of said action."

It is the contention of appellant that the legislature intended that an attorney's fee might be awarded and collected only in a case where the live stock is "seized and held by a writ of attachment," and that no personal judgment for attorney's fees should be rendered in any suit brought under this act. Counsel for respondents maintain that the case of *Dangberg v. Ruhenströth*, 26 Nev. 457-460, 70 Pac. 320, 321, is decisive of the question, quoting:

"There is a broad distinction between the two statutes. Ours does not sanction the restraining of animals by the owner of land, and provide for a lien in his favor for their care before suit. It contemplates only an action at law for damages for the trespass, with counsel fees and costs of suit."

The exact question under consideration in the case at bar was not before the court in that case; the court simply meant to distinguish between the California statute, which provided that the land owner might take possession of the trespassing live stock and commence an action *in rem*, whereas our statute provides that a party may commence an action at law, sue out and levy an attachment, and, if successful, recover judgment for damages, costs, and attorney's fees, which might be satisfied by recourse to the live stock attached. In this connection the language of Lord Halsbury, in *Quinn v. Leathern* (1 Br. Rul. Cas. 209), is most appropriate. He says:

"Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since



## Opinion of the Court—Coleman, J.

the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority of what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

The same idea is expressed by Lord Manners, in *Revell v. Hussey* (2 Ball & B. 286), from which we quote:

"It is always unsatisfactory to abstract altogether the reasoning of the court in any reported case from the facts to which this reasoning is meant to apply. It has a tendency only to misrepresent one judge and to mislead another."

See, also, *Cohen v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Ex Parte Young Ah Gow*, 73 Cal. 438, 15 Pac. 81; *Leisy v. Hardin*, 135 U. S. 135, 10 Sup. Ct. 681, 34 L. Ed. 128; *Mayer v. Erhardt*, 88 Ill. 457; *In Re Johnson*, 98 Cal. 541, 542, 33 Pac. 460, 21 L. R. A. 380.

Costs and attorney's fees were not allowed at common law, and can be awarded only when the person claiming them brings himself within the express terms of the statute. The statute quoted does not provide for a personal judgment against a defendant for attorney's fees, but simply makes the live stock liable for such fees, under certain conditions. There was no seizure and attachment of the live stock in this case; consequently there could be no personal judgment for attorney's fees against the defendant.

It may be possible that the legislature had in mind that a personal judgment should be rendered in suits brought under the act in question when the plaintiff prevails, but there is nothing in the language used to convey this idea; and, while the court may, and should, construe statutes so as to give effect to the intention of the legislature, yet if the words of the statute convey a definite meaning, there is no room for construction. (*Goldfield Con. M. Co. v. State*, 35 Nev. 183, 127 Pac. 77.)

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“It is the duty of the courts (in construing a statute) to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing.” (*Eddy v. Morgan*, 216 Ill. 437, 75 N. E. 174; 36 Cyc. 1106.)

“In construing a constitution the thing to be sought is the thought expressed.” (*Lewis v. Doron*, 5 Nev. 399.)

The judgment appealed from is modified by striking out so much thereof as awards plaintiffs an attorney’s fee in the sum of \$350, and, as so modified, it is affirmed.

NORCROSS, C. J.: I concur.

MCCARRAN, J.: I dissent.

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# GENERAL INDEX

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# GENERAL INDEX

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## ACKNOWLEDGMENT.

### 1. EVIDENCE—NOTARY'S CERTIFICATE.

In the absence of direct evidence on the question of mental capacity of the mortgagor owing to intoxication at the time of drawing the mortgage, the fact that the certificate of a notary public showed that the mortgage was acknowledged before him and that he executed it is *prima facie* evidence of due execution. *Seeley v. Goodwin*, 315.

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## ANIMALS.

### 1. TRESPASS—ACTIONS—ATTORNEY'S FEE—STATUTE.

Under Rev. Laws, sec. 2336, providing that live stock grazing on another's land shall be liable for damages, costs, and an attorney's fee, *held* that a personal judgment for the attorney's fee cannot be rendered against the owner of the stock. *Jensen v. Pradere*, 466.

### 2. TRESPASS—MEASURE OF DAMAGES.

In a trespass action for grazing sheep upon plaintiff's land, the damages may be calculated upon the reasonable value of pasturage, where the land was used only for such purposes. *Idem*.

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#### APPEAL AND ERROR.

##### 1. APPEAL ON JUDGMENT ROLL—STATUTE.

By direct provision of Rev. Laws, sec. 5338, a party may appeal on the judgment roll alone. *Daly v. Lahontan Mines Co.*, 14.

##### 2. APPEALABLE ORDERS—STATUTES.

Rev. Laws, 5339, providing that, upon an appeal from an order made on affidavit, a certified copy of the affidavit and counter affidavit shall be annexed to the order in place of the statement on appeal, and section 5356, providing that on appeal from an order appellant shall furnish the court with a copy of the notice of appeal, the order appealed from, and a copy of the papers used on the hearing, and a statement, if there be one, apply to appealable orders only, and do not give an appeal from orders not otherwise appealable. *Rosenthal v. Rosenthal*, 74.

##### 3. BRIEFS—ANIMADVERSIONS UPON OPPOSING COUNSEL.

Where statements in the reply brief of counsel for appellant reflecting upon the professional conduct of counsel for respondent are not warranted by anything appearing in the record, they are improper and will be directed to be expunged. *Raine v. Ennor*, 365.

##### 4. CONDITIONAL AFFIRMANCE.

Where the principles of a case are controlled by the decision in a former case in which a petition for rehearing is pending, the decision rendered in the case at bar will be subject to further order, dependent upon the final disposition of the petition for rehearing. *Porch v. Patterson*, 251.

##### 5. DENIAL OF NEW TRIAL—MEMORANDUM OF EXCEPTIONS AS EXCEPTIONS ON APPEAL.

Rev. Laws, 5320, specifies the causes for which new trials may be granted. Sections 5321, 5322, provide that a motion for error in law occurring at the trial and excepted to by the party making application must be made upon the minutes of the court without statement or bill of exceptions, and that the moving party shall, within ten days after the service of motion for new trial, serve upon the adverse party a memorandum of such errors as he intends to rely on upon the motion, verified by his attorney. Section 5325 provides that a judgment or order in a civil case may be reviewed as prescribed by the title. Section 5328 provides that when the appeal is based on the ground of errors in rulings on the evidence or upon the giving of erroneous instructions, appellant must present his motion for a new trial to the trial court and

have it determined before the appeal can be taken. Section 5331 defines a statement on appeal and presents the method of serving, filing, settling, and amending the same. Section 5335 provides that the omission to make a statement within the time limited shall be deemed a waiver of the right thereto, and the omission of proposed amendments an implied agreement to the statement, and section 5343 provides that a bill of exceptions may be taken to the order or ruling of the court, which shall be signed by the presiding judge and become a part of the record, and that any party aggrieved may appeal from the judgment or any appealable order without further statement or motion. Defendant filed a "Memorandum of Exceptions," submitted and relied upon in support of its motion for a new trial, which was verified by its attorney, but not settled by the court. *Held*, that the memorandum could not be considered as filling the office of bills of exceptions or a statement on appeal. *Ward v. Pittsburg Silver Peak*, 80.

6. DISMISSAL—RESTORATION.

An appeal dismissed for noncompliance with supreme court rules 2 and 3 will not be restored, where no purpose would be served, the record presenting for consideration only the judgment roll showing no error. *Skaggs v. Bridgman*, 310.

7. DISMISSAL OF APPEAL—DEFECTS IN PROCEEDINGS.

Notwithstanding Rev. Laws, 5358, where appellant fails to comply, at least substantially, with the provisions of the statute, the court can do nothing but dismiss the appeal, as the right of appeal is regulated by statute. *Ward v. Pittsburg Silver Peak*, 80.

8. DISMISSAL OF APPEAL—DEFECTS IN PROCEEDINGS.

Within Rev. Laws, 5358, providing that an appeal shall not be dismissed for any irregularity not affecting the jurisdiction of the court to hear and determine the appeal, or affecting the substantial rights of the parties, where there was no bill of exceptions or statement on appeal, but only a memorandum of exceptions for use on a motion for a new trial, the matter was one of jurisdiction. *Idem*.

9. MATTERS OUTSIDE OF RECORD.

The court on appeal from a judgment based on findings that land is mineral may consider a patent since issued conclusive that the land is not mineral. *Earl v. Morrison*, 120.

10. "MOOT CASE"—DISMISSAL.

Where, pending appeal from judgment sustaining demurrer to the complaint in an action to enjoin a nuisance, defendant built its plant and operated it for three years, without any perceptible harm to plaintiff's lands, the appeal would be dismissed as embodying a "moot case," one seeking to determine an abstract question which does not rest upon existing facts or rights, since the cause of action of plaintiff's complaint, if any was alleged, was based upon a threatened injury to its lands from proposed action which did not in fact follow such action. *Pac. L. Co. v. Mason Val. M. Co.*, 105.

## APPEAL AND ERROR—Continued.

## 11. MOTION TO DISMISS—TIME FOR FILING.

That a motion to dismiss an appeal for noncompliance with supreme court rules 2 and 3, providing that the transcript of the record must be filed within thirty days after the appeal has been perfected and the statement settled, otherwise the appeal will be dismissed on motion without notice, was not filed until more than three terms had elapsed after the appeal was taken and the record filed in the supreme court, did not amount to a waiver of the right to make a motion; supreme court rule 8, providing that objections to the record affecting any right "which might be cured on suggestion of diminution of the record," not applying. *Skaggs v. Bridgman*, 310.

## 12. NECESSITY OF STATEMENT—APPEAL FROM ORDER.

Upon appeal from an order denying costs, the pleadings cannot be considered unless embodied in a statement attached to the order. *Glock v. Elges*, 415.

## 13. ORDERS REVIEWABLE—DENIAL OF CONTINUANCE.

An order of the trial court dismissing a motion for a continuance is not directly appealable. *Rosenthal v. Rosenthal*, 74.

## 14. ORDERS REVIEWABLE—DENIAL OF CONTINUANCE.

An order denying a motion for a continuance can only be reviewed by appeal from a judgment or order refusing a new trial, or by bill of exceptions properly allowed by the trial court. *Idem*.

## 15. PRESUMPTION—RECORD.

Where the executors of an estate had made two reports before their final report, each of which was proved and settled by the court, and there was no evidence in the record that the estate could have been settled sooner with advantage, the court would not presume such to have been the fact. *In Re Hartung's Estate*, 200.

## 16. QUESTIONS REVIEWABLE.

Where the case is before the supreme court on appeal from an order sustaining demurrer to the complaint, the court cannot look back of the complaint to ascertain the facts. *Daly v. Lahontan Mines Co.*, 14.

## 17. RECORD ON APPEAL—STATEMENT AND BILL OF EXCEPTIONS.

In the absence of a statement on appeal or bill of exceptions, the appellate court is confined to examination of the judgment roll alone, and cannot review the denial of a continuance to take depositions. *Rosenthal v. Rosenthal*, 74.

## 18. REVIEW—CONFLICTING EVIDENCE.

A judgment will not be reversed for insufficiency of evidence where substantial, although conflicting, evidence supports it. *Picetti v. Wheeler*, 437.

## 19. REVIEW—FINDINGS—CONCLUSIVENESS.

A judgment will not be reversed where there is substantial evidence to support it. *Jensen v. Pradere*, 466.

## 20. REVIEW—OBJECTIONS NOT MADE BELOW.

On appeal from a judgment dismissing a suit for want of prosecution, the supreme court cannot consider the matter



whether no motion to dismiss was made or argued in the trial court; counsel for plaintiff should have moved to vacate the order of dismissal for that reason, offered evidence in support thereof, and, if the court refused to vacate the order, the supreme court could have considered the question on appeal. *Raine v. Ennor*, 365.

21. REVIEW—PRESUMPTIONS.

In view of Rev. Laws, 4922, 5356, a judgment of dismissal is sufficient without a recital in the record that a motion to dismiss had been made; the presumption being that everything was done to lay the foundation for a valid judgment of dismissal, whether the making of a motion to dismiss, or something more. *Idem*.

22. REVIEW—SUFFICIENCY OF EVIDENCE.

An appellate court is reluctant to disturb the trial court's judgment on the ground that the evidence does not justify it, and will not do so except where there is no substantial evidence to support it. *Gault v. Grose*, 274.

23. RIGHT OF REVIEW—SATISFACTION IN PART.

Plaintiff does not waive his right of appeal from that portion of a judgment denying him costs by accepting payment for the damage and interest items, and satisfying the judgment to that extent. *Glock v. Elges*, 415.

24. SCOPE OF REVIEW—CONFLICTING TESTIMONY.

Where the testimony of the plaintiff on the trial of an action to foreclose a mechanic's lien was positive that a notice disclaiming liability for the work done was not posted, and the defendant's testimony was equally positive that it was posted, there was such a conflict in the testimony that the determination of the lower court would not be disturbed. *Gaston v. Aransino*, 128.

25. SCOPE OF REVIEW—MATTERS NOT AT ISSUE.

The court on appeal will assume a ruling of the trial court not questioned by counsel for the adverse party to have been correct. *Seeley v. Goodwin*, 315.

26. STATEMENT—NEW STATEMENT—JURISDICTION.

The supreme court has no power to make a new statement on appeal, which must be settled in the lower court, or to direct that court to make one. the statement having been settled as prescribed by statute; but any relief under the practice act, sec. 142 (Rev. Laws, 5084), by reason of mistake, inadvertence, surprise, or excusable neglect of appellant, must be had in the lower court; a motion for a new trial there made having never been determined. *Skaggs v. Bridgman*, 310.

27. STATEMENT—TIME FOR FILING—FAILURE TO FILE—EFFECT.

A statement, not served and filed within the time prescribed by Rev. Laws, 5331, cannot be considered on appeal. *Glock v. Elges*, 415.

28. STATEMENT—TIME FOR FILING—FAILURE TO FILE—EFFECT.

A failure to serve and file a statement within the time prescribed by Rev. Laws, 5331, does not defeat the appeal, where

**APPEAL AND ERROR—Continued.**

It was duly perfected under section 5330, by filing a notice of appeal and undertaking or waiver thereof. *Idem.*

**29. STATEMENT—TIME FOR FILING—WAIVER OF DEFECTS IN NOTICE.**

Under Rev. Laws, 5331, requiring a proposed statement to be served and filed within thirty days after written notice of the judgment or order appealed from, any defect in such notice is waived by serving and filing a notice of appeal. *Idem.*

See CRIMINAL LAW, 3.

**APPEAL FROM COST BILL.** See COSTS, 5.

**APPEAL FROM JUSTICE'S COURT.** See COSTS, 1.

**"APEX."** See MINES AND MINERALS, 1.

**ASSAULT WITH DEADLY WEAPON.** See CRIMINAL LAW, 24.

**ASSAULT WITH INTENT TO KILL.** See CRIMINAL LAW, 12.

**ASSERTION OF RIGHT.** See EQUITY, 1.

**ASSIGNEE.** See VENDOR AND PURCHASER, 2.

**ASSUMPTION OF RISK.** See MASTER AND SERVANT, 2.

**ATTACHMENT.** See JUDGMENT, 3.

**ATTENDANCE OF WITNESSES.** See COSTS, 2.

**ATTORNEYS' FEES.****1. DISCRETION OF TRIAL COURT.**

No question of attorneys' fees being presented by the record, the matter of an allowance for such fees to counsel for appellant is entirely within the province of the trial court. *In Re Hartung's Estate*, 200.

See ANIMALS, 1.

**AUTHORITY TO CONVEY.** See GUARDIAN AND WARD, 1.

**AUTOMOBILES.** See MUNICIPAL CORPORATIONS, 2.

**"BEQUEATH."** See WILLS, 1.

**BILL OF EXCEPTIONS.** See APPEAL AND ERROR, 8, 17.

**BILL OF SALE.** See PRESUMPTION OF OWNERSHIP, 1.

**BREAKING.** See CRIMINAL LAW, 4.

**BRIEFS.** See APPEAL AND ERROR, 3.

**BURGLARY.** See CRIMINAL LAW, 4, 5, 27.

**BUSSES.** See LICENSES, 2, 3.

**CAPACITY OF PARTIES.** See MORTGAGES, 1, 2, 5.

**CARDINAL RULE.** See WILLS, 2.

## CERTIORARI.

## 1. DISCRETION OF COURT—OBJECTIONS TO COST BILL.

In an action in the district court on appeal from justice court, where by statute it was the province and duty of the court to exercise its discretion in allowing items of cost before the same could become part of the judgment, even though no objections were filed, error in refusing to strike objections to the cost bill is not reviewable on *certiorari*. *McLeod v. District Court*, 337.

## 2. FUNCTION OF WRIT—ACT OF DISTRICT COURT.

On *certiorari* to review the act of the district court in striking items from the cost bill, the scope of the inquiry permissible is that of jurisdiction, and, if the act of the district court was within its jurisdiction, the inquiry ceases, and the writ has no function to perform; an authorized act of a court not being reviewable by *certiorari*. *Idem*.

## 3. GROUNDS—WANT OF JURISDICTION—COURTS.

*Certiorari* will lie to review the erroneous assumption of jurisdiction by a district court, where a statutory step was omitted upon appealing to it from a justice court. *Yowell v. District Court*, 423.

CITY COUNCIL. See LICENSES, 2.

CIVIL JURISDICTION. See JUSTICES OF THE PEACE, 3.

CIVIL LIABILITY. See FORCIBLE ENTRY AND DETAINER, 2.

CLAIMS. See MECHANICS' LIENS, 4.

CLAIMS AGAINST ESTATES. See EXECUTORS AND ADMINISTRATORS, 1, 2, 3.

CLAIMANTS. See MECHANICS' LIENS, 5, 7, 13.

CLEMENCY. See WITNESSES, 3.

CLERK'S FEES. See COSTS, 3.

COLLATERAL ATTACK. See JUDGMENT, 1, 2.

COMMON-LAW SENSE OF WORDS. See STATUTES, 7, 8.

COMMUNITY ESTATE. See HUSBAND AND WIFE, 1.

COMMUNITY PROPERTY. See HOMESTEAD, 1.

COMPETENCY OF WITNESSES. See CRIMINAL LAW, 6.

COMPLAINT. See EXECUTORS AND ADMINISTRATORS, 1, 2, 3; INDICTMENT AND INFORMATION, 1.

CONCLUSIVE EVIDENCE. See APPEAL AND ERROR, 19.

CONCLUSIVE SHOWING. See HABEAS CORPUS, 3.

CONCLUSIVENESS OF JUDGMENT. See JUDGMENT, 3.

CONDITIONAL AFFIRMANCE. See APPEAL AND ERROR, 4.

CONFESSIONS. See CRIMINAL LAW, 1, 7, 11; WITNESSES, 2.

CONFLICTING EVIDENCE. See APPEAL AND ERROR, 18, 24;  
CRIMINAL LAW, 10, 30; EXTRADITION, 1.

CONFLICTING JURISDICTION. See JUSTICES OF THE PEACE, 3.

CONSENT. See HOMESTEAD, 1; HUSBAND AND WIFE, 1.

CONSOLIDATION OF SUITS. See MECHANICS' LIENS, 2, 3, 13.

CONSTITUTION. See HOMESTEAD, 1.

#### CONSTITUTIONAL LAW.

##### 1. STATUTES—NOMINATIONS—VALIDITY—ENFORCEMENT.

On an application for prohibition on the eve of election to annul Stats. 1915, c. 283, providing for the nomination of candidates by political parties, and the holding of primaries and conventions, the court will not speculate on the effect of possible contingencies on the validity of the act, nor annul it because contingencies may arise under section 11 of such act which would make the act impossible of enforcement. *Turner v. Fogg*, 406.

##### 2. VALIDITY OF STATUTES—APPORTIONMENT.

Where a petition fails to show that authorized representatives of the Progressive party sought to preserve the rights of their party under section 8, Stats. 1915, c. 283, for the apportionment of convention delegates, *held* that petitioners for writ of prohibition cannot question the validity of section 3, providing for apportionment on the basis of vote for congressmen at the last election. *Idem*.

See ELECTIONS, 2, 3.

CONSTRUCTION. See STATUTES, 2, 3, 4, 5, 6, 7, 8; WILLS, 1, 2, 3, 4, 5.

CONSTRUCTION OF STATUTES. See ELECTIONS, 3; JUSTICES OF THE PEACE, 5; MECHANICS' LIENS, 1.

#### CONTINUANCE.

##### 1. ENFORCEMENT OF MECHANICS' LIEN.

Under Rev. Laws, sec. 2227, providing that, at the time of filing the complaint and issuing the summons in a lien action, the plaintiff shall notify all persons claiming liens to exhibit proof, and that all liens not exhibited shall be deemed to be waived in favor of those exhibited, where lien claimants sued to enforce their lien, and gave proper notice to other claimants to exhibit their liens, and other claimants, who had an opportunity to exhibit their liens and had elected to institute an independent suit, appeared by attorney and stated that the other suit was pending for the foreclosure of their liens, and that at the proper time they would appear and join in the foreclosure, the court very properly refused the claimants' continuance. *Daly v. Lahontan Mines Co.*, 14.

See APPEAL AND ERROR, 13, 14, 17; MECHANICS' LIENS, 3.

CONTRIBUTORY NEGLIGENCE. See TRIAL, 5.

CONTROL OF COMMUNITY ESTATE. See HUSBAND AND WIFE, 1.

CONTROL OF COMMUNITY PROPERTY. See HOMESTEAD, 1.

CONVEYANCE. See VENDOR AND PURCHASER, 1.

CONVEYANCE BY GUARDIAN. See GUARDIAN AND WARD, 1.

CONVICTED JOINT PRINCIPAL. See WITNESSES, 3.

CONVICTION. See CRIMINAL LAW, 5, 17; HABEAS CORPUS, 5.

CONVICTS. See CRIMINAL LAW, 6, 7, 17, 18.

CONVICTS' TESTIMONY. See CRIMINAL LAW, 17, 18.

#### CORPORATIONS.

1. FOREIGN CORPORATIONS—SERVICE OF PROCESS—STATUTES—"AGENT OR OTHER HEAD"—"AGENT."

Comp. Laws, 3124, provides that service of process against a foreign corporation doing business within the state may be made on an agent, cashier, secretary, president, or other head thereof. Section 899 provides that every foreign corporation doing business in the state shall appoint an agent upon whom all legal process may also be served. In an action to enforce a mechanic's lien against a foreign corporation, service was made on its manager, who had not been appointed its agent therefor. *Held*, that such service was valid under section 3124, which was in force at the passage of section 899, since the manager of a corporation is such an agent or "other head" of a company as is contemplated by the statute; an "agent" being one who has authority to act for another. *Daly v. Lahontan Mines Co.*, 14.

CORPUS DELICTI. See CRIMINAL LAW, 13, 14.

CORROBORATION. See EVIDENCE, 4.

#### COSTS.

1. APPEAL FROM JUSTICE'S COURT—STATUTES.

Where a case comes to the district court on appeal from justice's court, costs in the district court do not follow as of course, but come under the provisions of Rev. Laws, 5380, whereby the district court is authorized and directed to exercise its discretion in cases other than those mentioned in section 5377, prescribing allowance of costs as of course. *McLeod v. District Court*, 337.

2. ATTENDANCE OF WITNESSES—MILEAGE.

Under Rev. Laws, sec. 5431, providing that no person shall be required to attend as a witness out of the county in which he resides, unless the distance be less than 30 miles from his residence, the mileage of witnesses residing in another county more than 30 miles from the place of trial cannot be taxed as costs. *Zelarin v. Tonopah Belmont*, 1.

**COSTS—Continued.****3. ITEMS—CLERK'S FEES—STRIKING COST BILL.**

Under Rev. Laws, 5387, requiring the clerk to tax his fees, such fees should be taxed in favor of a prevailing plaintiff, although the bill of costs was properly stricken. *Glock v. Elges*, 415.

**4. OBJECTION TO BILL OR ITEMS—TIME.**

Until the discretion of the district court on appeal from justice's court was exercised in fixing costs, there was nothing in the statutes or procedure preventing the party against whom the costs might be assessed from appearing to object to the whole cost bill, or any items therein. *McLeod v. District Court*, 337.

**5. PROCEDURE FOR RETAXING IN SUPREME COURT.**

Under rule 6, paragraph 3, Rules of Supreme Court, objections to cost bill must be filed with the clerk of the court and heard and settled by such clerk. From the ruling of the clerk an appeal may be taken to the court. The court will not consider objections to a cost bill except upon appeal from the decision of the clerk. *In Re Hartung's Estate*, 200.

**6. WITNESS FEES—AUTHORITY TO TAX.**

Witness fees may only be taxed when expressly allowed by legislative enactment. *Zelavin v. Tonopah Belmont*, 1.

See **APPEAL AND ERROR**, 12; **CERTIORARI**, 1, 2; **FORCIBLE ENTRY AND DETAINER**, 3.

**COUNTERCLAIM.** See **EXECUTORS AND ADMINISTRATORS**, 2, 3.

**COUNTY COMMISSIONERS.** See **LICENSEE**, 1, 2.

**COURTS OF RECORD.** See **JUSTICES OF THE PEACE**, 3.

**COVERTURE.** See **HUSBAND AND WIFE**, 1.

**CREDIBILITY OF WITNESS.** See **EVIDENCE**, 4.

**CREST OF VEIN.** See **MINES AND MINERALS**, 1.

**CRIMINAL LAW.****1. APPEAL—PRESENTATION—ADMISSION OF CONFESSION.**

An assignment of error complaining of the admission of a confession could not be considered where the transcript of the testimony disclosed no objection, though appellant's counsel stated to the court that objections to the admissibility of the confession had been made and apparently omitted from the transcript through inadvertence, in the absence of proof that such was the case and a request made for diminution of the record. *State v. Blaha*, 115.

**2. APPEAL—REVIEW—DISCRETION OF TRIAL COURT—REFUSAL TO ALLOW WITHDRAWAL OF PLEA.**

The decision of the trial court on motion to withdraw a plea to the merits of an information for the purpose of interposing a plea in abatement will not be disturbed, where its discretion has been exercised without effecting a manifest injustice, and

where there is no improper assumption of jurisdiction. *State v. Wells*, 432.

3. APPEAL AND ERROR—REVIEW—EVIDENCE SUPPORTING VERDICT.

Judgment in a criminal case will not be reversed for insufficiency of evidence where the verdict is supported by substantial evidence. *State v. Whitaker*, 159.

4. BURGLARY—BURGLARY IN THE FIRST DEGREE—TIME OF BREAKING—SUFFICIENCY OF EVIDENCE.

In a prosecution for burglary in the first degree, evidence held sufficient to justify finding that the mill was broken into in the nighttime, between sunset and sunrise, as defined by Rev. Laws, 6634. *Idem*.

5. BURGLARY—CONVICTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for burglary in the first degree, evidence held to justify verdict of guilty against a defendant. *Idem*.

6. COMPETENCY—CONVICTS—JOINT PRINCIPAL.

One who was jointly indicted with accused for murder and on previous separate trial had been convicted was a competent witness for the state in a murder trial under Rev. Laws, 5419, defining witnesses, and Rev. Laws, 7451, applying section 5419 to criminal actions. *State v. Tranmer*, 142.

7. CONVICTS—CRIMES—POWER TO PUNISH.

Where accused was serving a life sentence in the state prison for murder, the district court had jurisdiction to order his production before it for trial on another murder charge. *Idem*.

8. EVIDENCE—CONFESSIONS—PRELIMINARY PROOF.

A statement of defendant in police headquarters while under arrest charged with the offense is not admissible as part of the state's case in chief without a showing that the statement was voluntary, and made without hope of reward or inducement or fear of punishment. *State v. Wilson*, 298.

9. EVIDENCE—RES GESTÆ.

Where the prosecuting witness, when first asked who stabbed her, gave an equivocal answer, and stated that others ought to know the man, her next charge that accused was guilty, made forty-five minutes after the occurrence, when her wounds had been dressed and she was under no particular excitement, is not admissible as part of the *res gestæ*, there having been sufficient time to fabricate. *State v. Pappas*, 40.

10. EXAMINATION OF WITNESSES—REMARK OF TRIAL COURT—HARMLESS ERROR.

Where, on a murder trial, the testimony of a witness went solely to the identity of accused, and his participation in the crime had been clearly shown, the remark of the trial judge, made while counsel for defense was reading questions and answers of the witness at a former trial for the purpose of impeaching him, that " \* \* \* there is apparently no inconsistencies or contradictions," there being no substantial conflict between the two testimonies, was harmless error under

CRIMINAL LAW—*Continued.*

the statute providing for the disregard of technical errors, where no substantial rights are denied. *State v. Tranmer*, 142.

## 11. HARMLESS ERROR—EVIDENCE—STATEMENTS BY ACCUSED.

Error, if any, in permitting witnesses to testify to conclusions relative to statements made by accused to officers while he was under arrest, was harmless, where the whole conversation between defendant and the officers was detailed, and it clearly appeared that the statements were freely and voluntarily made. *State v. Blaha*, 115.

## 12. HOMICIDE—ASSAULT WITH INTENT TO KILL—INTENT.

In a prosecution for assault with intent to kill, the specific intent being an element of the offense, no presumption of law can arise which will decide that question; hence a charge that, if accused assaulted another with a deadly weapon in a manner calculated to produce death, the law presumes such was his intention is erroneous. *State v. Pappas*, 40.

## 13. HOMICIDE—CORPUS DELICTI—PROOF.

The *corpus delicti* of a murder may be established by inference from facts as well as from positive testimony. *State v. Tranmer*, 142.

## 14. HOMICIDE—SUFFICIENCY OF EVIDENCE.

In a trial for murder, evidence held sufficient to establish the *corpus delicti*. *Idem*.

## 15. INSTRUCTIONS—REQUEST—FALSE TESTIMONY.

Failure to instruct on the maxim, "*Falsus in uno, falsus in omnibus*," was not error, where accused made no request for such instructions. *State v. Blaha*, 115.

## 16. INSTRUCTIONS—TESTIMONY OF ACCUSED.

In view of Rev. Laws, 7160, as amended by Stats. 1915, c. 157, providing that no special instructions shall be given relating exclusively to the testimony of defendant, the court properly refused to instruct that defendant had testified in his own behalf, and that this was his legal right, and that the jury were not permitted to reject his testimony merely because he was the accused. *Idem*.

## 17. JOINT PRINCIPAL—CONVICTION—DEATH PENALTY—TESTIMONY.

On a trial for murder, where a joint principal in the crime with accused who had been previously convicted and sentenced to death is called as a witness by the state, it is reversible error to allow the state, for the purpose of influencing the jury to inflict the death penalty on accused, to ask the witness if he is in the state's prison under sentence of death. *State v. Tranmer*, 142.

## 18. JOINT PRINCIPAL AS WITNESS—IMPROPER QUESTION—MISCONDUCT.

Where, on a murder trial, a principal with accused in the murder, who had been previously convicted and sentenced to death, was produced as a witness by the state, and during the early part of his examination counsel for accused had asked the state in the jury's presence whether it was admitted that witness was then under conviction of a felony and in the state's prison, it was misconduct for the state's counsel to



ask the witness whether he was not then in the penitentiary under sentence of death, where the only object of the state's question was to influence the jury to assess the death penalty against accused. *Idem*.

19. PARTIES TO OFFENSE—ACCESSORY AFTER FACT.

The act of the petitioner in leaving Utah himself with the stolen bonds on his person did not render him an accessory after the fact to the crime of obtaining property by false pretenses. *In Re Overfield*, 30.

20. PARTIES TO OFFENSES—ACCESSORY AFTER FACT—STATUTE—"HARBOR AND PROTECT."

Under Pen. Code Utah, sec. 4075, providing that persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor or protect the person charged therewith or convicted thereof, are accessories, where petitioner for *habeas corpus*, after a third person in Utah procured certain bonds from another by false pretenses, induced the defrauded person to delay the institution of criminal proceedings against the third person for a few days, during which the latter left the State of Utah, petitioner was not an accessory after the fact to the crime, since the words "harbor and protect" of the statute imply more than mere withholding of knowledge as to the whereabouts of the party charged, and necessarily contemplate some affirmative act or acts of concealment or assistance rendered to the principal personally; mere words of inducement or persuasion intended to cause a third party to delay filing a criminal charge not being enough to bring the party within the statute. *Idem*.

21. PLEA—NOT GUILTY—WITHDRAWAL.

A motion to set aside a plea of not guilty for the purpose of interposing a plea in abatement is addressed to the sound judicial discretion of the trial court. *State v. Wells*, 432.

22. PLEA IN ABATEMENT—TIME AND ORDER OF PLEADING.

The objection in a plea of abatement that no preliminary hearing on the charge was had or waived, and that no leave of court was obtained for the filing of the information, should be made before plea of not guilty is entered. *Idem*.

23. PRELIMINARY EXAMINATION—EVIDENCE.

It is not required upon preliminary examination, in order to warrant a magistrate in holding the accused to answer, that the evidence taken as a whole be sufficient to warrant a jury in reaching a conclusion of the guilt of the accused beyond a reasonable doubt. *Ex Parte Molino*, 360.

24. PRELIMINARY EXAMINATION—EVIDENCE.

Where it appeared that the accused, charged with assault with a deadly weapon, was carrying a pistol and a belt filled with cartridges for the purpose of protecting himself and certain live stock against a possible attack by rabid coyotes, for the purposes of preliminary examination, the magistrate would be justified in acting upon the probability that the accused would not be carrying an unloaded pistol for such purpose. *Idem*.

## CRIMINAL LAW—Continued.

## 25. PRELIMINARY EXAMINATION—NECESSITY—RIGHT OF ACCUSED.

Under Stats. 1913, c. 209, sec. 2, requiring, in all cases where defendant has not had or waived a preliminary examination, that there be filed with the information an affidavit verifying it upon affiant's personal knowledge, and section 9 thereof, as amended (Stats. 1915, c. 17), providing that an information may be filed after preliminary examination, or waiver of it, but if accused has been discharged on preliminary examination, or the complaint upon which the examination has been held has not been delivered to the clerk, the district attorney may file an information, upon affidavit, of any person knowing of the offense, etc., but that such affidavit need not be filed where the defendant has waived a preliminary examination or upon such examination has been bound over, one accused of crime has a right to opportunity to either have or waive preliminary examination. *State v. Wells*, 432.

## 26. PRELIMINARY EXAMINATION—SUFFICIENCY OF EVIDENCE.

Testimony on a preliminary hearing for larceny from the person, held, in *habeas corpus* proceedings, not to make reasonable or probable that the crime was committed by accused so as to constitute the sufficient cause necessary under Rev. Laws, 6987, for holding them to answer. *Ex Parte Williams and Lathrop*, 440.

## 27. SELF-SERVING STATEMENTS—FOUNDATION FOR ADMISSION—NECESSITY.

In a prosecution for burglary, it was not necessary that a foundation be laid for the admission of defendant's statements that he purchased the stolen jewelry in certain cities. *State v. Blaha*, 115.

## 28. TRIAL—VERDICT.

A verdict will not be held void for uncertainty if its meaning can be determined by reference to the record. *Ex Parte Booth*, 183.

## 29. TRIAL—VERDICT.

A judgment must follow and be supported by the verdict, and, if the verdict is not such as is determinative of the issues made by plea of not guilty, it is a void verdict, and the court has no jurisdiction to enter judgment thereon. *Idem*.

## 30. WEIGHT OF EVIDENCE.

Where testimony of a witness given upon cross-examination modifies, varies, or conflicts with the testimony given upon direct examination, it is the province of the magistrate, the court, or the jury, as the case may be, to determine the truth of the witness's testimony from the entire examination. *Ex Parte Molino*, 360.

## 31. WITNESSES—REFRESHING MEMORY—HARMLESS ERROR.

Where, on a murder trial, a witness was allowed to refresh his memory as to a statement made by accused, by reading his testimony at the coroner's inquest, and his testimony given after such refreshing was substantially the same as before, there was no reversible error, since accused was not prejudiced thereby. *State v. Tranmer*, 142.

- CROSS-EXAMINATION. See CRIMINAL LAW, 30; WITNESSES, 1.
- CUSTODY. See HABEAS CORPUS, 7.
- DAMAGES. See ANIMALS, 1, 2; FORCIBLE ENTRY AND DETAINER, 1, 4; LANDLORD AND TENANT, 1.
- DEADLY WEAPON. See CRIMINAL LAW, 12.
- DEATH OF DEVISEE. See WILLS, 6.
- DEATH PENALTY. See CRIMINAL LAW, 17, 18.
- DECLARATION. See HOMESTEAD, 1.
- DEED OF CONVEYANCE. See HOMESTEAD, 1.
- DEFAULT. See JUSTICE OF THE PEACE, 4.
- DEFECT. See INDICTMENT AND INFORMATION, 1.
- DEFECTS IN NOTICE OF APPEAL. See APPEAL AND ERROR, 29.
- DEFECTS IN PROCEEDINGS. See APPEAL AND ERROR, 7, 8.
- DEFENDANT'S THEORY. See TRIAL, 6, 7.
- DEGREE OF PROOF. See MORTGAGES, 5.
- DEGREES. See LIBEL AND SLANDER, 1, 3.
- DEMURRER. See APPEAL AND ERROR, 16.
- DENIAL OF CONTINUANCE. See APPEAL AND ERROR, 13.
- DENIAL OF NEW TRIAL. See APPEAL AND ERROR, 5.
- DEPOSITIONS. See APPEAL AND ERROR, 17.
- DETAINER. See LANDLORD AND TENANT, 1.
- "DEVISE." See WILLS, 1, 6.
- DILIGENCE. See EQUITY, 1.
- DIRECT EVIDENCE. See HABEAS CORPUS, 6.
- DISCHARGE. See HABEAS CORPUS, 1, 3.
- DISCRETION OF TRIAL COURT. See ATTORNEY'S FEES, 1; CERTIORARI, 1; COSTS, 1, 4; CRIMINAL LAW, 2, 21; DISMISSAL AND NONSUIT, 2.
- DISMISSAL AND NONSUIT.
1. MOTION TO DISMISS—BURDEN TO EXCUSE NEGLECT IN PROSECUTION.  
When a motion to dismiss for want of prosecution is made in a case in which no step has been taken by plaintiff for several years, the duty rests upon him to excuse his neglect. *Raine v. Ennor*, 365.
  2. WANT OF PROSECUTION—DISCRETION OF TRIAL COURT.  
Where a complaint was filed April 9, 1904, defendants brought and filed demurrers May 20, 1904, and nothing more

**DISMISSAL AND NONSUIT—Continued.**

was done in the case until June, 1913, judgment dismissing the suit for want of prosecution, plaintiff making no offer to show excusable neglect, was not an abuse of discretion on the part of the trial court. *Idem.*

**3. WANT OF PROSECUTION—OBTAINING INJUNCTION.**

The fact that plaintiff obtained an injunction in his suit against defendants is of no importance on appeal from a judgment dismissing the suit for want of prosecution, since the obtaining of an injunction is not a move in the prosecution of a suit tending to bring it to issue or trial. *Idem.*

**DISMISSAL OF ACTION.** See **APPEAL AND ERROR**, 20, 21.

**DISMISSAL OF APPEAL.** See **APPEAL AND ERROR**, 6, 7, 8, 10, 11.

**DISTRICT COURT.** See **CRIMINAL LAW**, 7.

**ELECTIONS.****1. PRIMARY ELECTIONS—REGISTRATION.**

Under Stats. 1915, c. 283, secs. 12 and 14, which was not repealed by Stats. 1915, c. 285, sec. 8, the names of electors which appear upon the certified registration list as copied from the register of the last general election, together with the names that appear on the supplemental list, constitute the list of electors qualified to vote at the primary election. *Turner v. Fogg*, 406.

**2. REGISTRATION OF PARTY AFFILIATION—VALIDITY OF STATUTE.**

Stats. 1915, c. 283, secs. 12 and 14, requiring electors to register their party affiliation as a prerequisite to the right to vote at primary election, is a reasonable regulation and valid exercise of the legislative power. *Idem.*

**3. STATUTES—CONSTRUCTION.**

Election laws are to be liberally construed to enable the largest participation of qualified electors in all elections. *Idem.*

**END LINES.** See **MINES AND MINERALS**, 2.

**ENFORCEMENT.** See **MECHANICS' LIENS**, 2.

**ENFORCEMENT OF MECHANIC'S LIEN.** See **CONTINUANCE**, 1.

**EQUITABLE LIEN.** See **MORTGAGES**, 4.

**EQUITY.****1. MAXIMS—APPLICATION.**

Though equity considers that done which should have been done, it does not follow that an equitable right once existing will always exist; but, to avail oneself of such right, it must be asserted in apt time and diligently prosecuted. *Daly v. Lahontan Mines Co.*, 14.

**ERRONEOUS VERDICT.** See **HABEAS CORPUS**, 1.

**ERROR.** See **CRIMINAL LAW**, 10, 11, 15, 31.

ERROR IN JURISDICTION. See JUDGMENT, 1, 2.

ESTATES. See APPEAL AND ERROR, 15; EXECUTORS AND ADMINISTRATORS, 1, 2, 3; JUSTICES OF THE PEACE, 3.

## EVIDENCE.

### 1. AFFIRMATIVE DEFENSE.

To maintain an affirmative defense it must be established by a preponderance of the evidence. *Gault v. Grose*, 274.

### 2. "NEGATIVE TESTIMONY."

The testimony of one claiming a mechanic's lien for work performed upon a building that he worked on the building, that at the time he looked for a notice signed by the owner that he would not be responsible for the repairs, and that there was no such notice at any time while he was doing the work is not negative testimony such as may be disregarded in the face of positive testimony that the notice was posted. *Gaston v. Aransino*, 128.

### 3. SIMILAR FACTS—INJURIES TO SERVANT—STATE MINING INSPECTION RULES.

In a miner's action for injuries, rules posted at the mine, several months after the injury, by the state mining inspector, were not admissible in evidence by the mere fact that they were similar to the ones posted by defendant before the time of the injury. *Zelarin v. Tonopah Belmont*, 1.

### 4. WEIGHT—CREDIBILITY OF WITNESS.

If the jury believe from the evidence that a witness has wilfully sworn falsely as to material matters, they are at liberty to disregard his entire testimony, except as corroborated by other credible evidence. *Idem*.

See ACKNOWLEDGMENT, 1; APPEAL AND ERROR, 18, 19, 22, 24; CRIMINAL LAW, 3, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 23, 24, 27, 30; DISMISSAL AND NONSUIT, 1, 2; EXTRADITION, 1; HABEAS CORPUS, 3, 6; MECHANICS' LIENS, 12; MORTGAGES, 1, 2, 5; OWNERSHIP, 1; TRIAL, 1; WATER AND WATERCOURSES, 1; WITNESSES, 1, 2, 3.

EXAMINATION OF WITNESS. See CRIMINAL LAW, 10.

EXCEPTION TO SURETIES. See JUSTICES OF THE PEACE, 1, 2.

EXCEPTIONS ON APPEAL. See APPEAL AND ERROR, 5, 17.

EXCUSABLE NEGLECT. See APPEAL AND ERROR, 26; DISMISSAL AND NONSUIT, 1, 2.

EXECUTION. See MORTGAGES, 1, 2, 5.

EXECUTIVE WARRANT. See HABEAS CORPUS, 2, 4.

EXECUTORS. See APPEAL AND ERROR, 15.

## EXECUTORS AND ADMINISTRATORS.

### 1. CLAIMS—OFFSETS—STATUTE.

Rev. Laws, 5965, providing for the support by affidavits of claims against decedents' estates, contemplates that offsets in

**EXECUTORS AND ADMINISTRATORS—Continued.**

favor of the decedent and known to the claimant be credited upon the claim. *Hibbard v. Clark*, 220.

**2. COMPLAINT—SET-OFF—INCLUSION.**

In a complaint on a rejected claim against a decedent's estate, the facts constituting an offset or counterclaim in favor of the estate must be alleged; the general rule of pleading that a complaint need not allege facts constituting an offset or counterclaim being inapplicable by reason of the provisions of Rev. Laws, 5965, which contemplates the credit of offsets upon such claims. *Idem*.

**3. REJECTED CLAIM—COMPLAINT—PARTICULARITY.**

Where plaintiff's rejected claim against decedent's estate admitted a set-off in favor of decedent for several loans made on the security of real estate and contracts to purchase real estate, the complaint in an action on such rejected claim was insufficient for uncertainty where it failed to specifically set out the loans made, and the property transferred and contracts assigned as security with sufficient fullness to acquaint the defendant administrator and the court therewith. *Idem*.

**EXTRADITION.****1. FUGITIVE FROM JUSTICE—CONFLICTING EVIDENCE—JURISDICTION.**

The guilt or innocence of one held under extradition as a fugitive from the justice of another state is a matter exclusively for the courts of the demanding state where the evidence is conflicting. *Ex Parte La Vere*, 214.

See **HABEAS CORPUS**, 2, 4, 7.

**EXTRALATERAL RIGHTS.** See **MINES AND MINERALS**, 1, 2, 3.

**FAILURE TO FILE STATEMENT ON APPEAL.** See **APPEAL AND ERROR**, 27, 28.

**FALSE PRETENSES.** See **CRIMINAL LAW**, 19.

**FALSE SWEARING.** See **EVIDENCE**, 4.

**FALSE TESTIMONY.** See **CRIMINAL LAW**, 15.

**"FALSUS IN UNO, FALSUS IN OMNIBUS."** See **CRIMINAL LAW**, 15.

**FEDERAL LAND DEPARTMENT.** See **PUBLIC LANDS**, 1.

**FEES OF COURT CLERKS.** See **COSTS**, 3.

**FEES OF WITNESS.** See **COSTS**, 6.

**FELONY.** See **LIBEL AND SLANDER**, 1, 2, 3.

**FINAL ACCOUNT.** See **APPEAL AND ERROR**, 15.

**FINDINGS.** See **APPEAL AND ERROR**, 19.

**FIRST DEGREE BURGLARY.** See **CRIMINAL LAW**, 4.

**FORCED SALE.** See **HOMESTEAD**, 1.

**FORCIBLE ENTRY AND DETAINER.**

1. **APPEAL—DETERMINATION OF CAUSE—MODIFICATION—INCREASING RECOVERY.**

The supreme court will not modify a judgment to allow treble damages in a forcible entry case, under Rev. Laws, 5508, where the facts are not before it. *Glock v. Elges*, 415.

2. **CIVIL LIABILITY—PERSONS ENTITLED TO SUE.**

In an action to recover damages for forcible entry, plaintiff must prove his title or right to possession of the property where the pleadings raise that issue. *Idem*.

3. **COSTS—STATUTE.**

Rev. Laws, 5377, allowing plaintiff costs upon a favorable judgment in an action involving the title or possession of real estate, applies to recovery of damages for forcible entry, where plaintiff's title or right of possession was disputed. *Idem*.

4. **DAMAGES—STATUTE—"MAY."**

Rev. Laws, 5508, providing that in forcible entry cases, judgment "may" be entered for treble the actual damages, permits, but does not require, such penalty to be imposed. *Idem*.

**FORECLOSURE.** See **APPEAL AND ERROR**, 24; **LIMITATION OF ACTIONS**, 2; **MECHANICS' LIENS**, 3, 7, 9; **MORTGAGES**, 3, 5.

**FORECLOSURE OF MECHANIC'S LIEN.** See **CONTINUANCE**, 1.

**FORECLOSURE OF MORTGAGE.** See **GUARDIAN AND WARD**, 1.

**FOREIGN CORPORATION.** See **CORPORATIONS**, 1.

**FRAUD.** See **MECHANICS' LIENS**, 10, 11.

**FUGITIVE FROM JUSTICE.** See **EXTRADITION**, 1; **HABEAS CORPUS**, 3, 4.

**GRAZING.** See **ANIMALS**, 1, 2.

**"GREAT NECESSITY OR EMERGENCY."** See **MUNICIPAL CORPORATIONS**, 1.

**GROUND FOR CERTIORARI.** See **CERTIORARI**, 3.

**GUARDIAN AND WARD.**

1. **CONVEYANCE BY GUARDIAN—AUTHORITY.**

Where a guardian of an infant gave a mortgage upon the common property of the infant, and the guardian, in order to pay off a mortgage about to be foreclosed, such mortgage was not valid; there being at the time no statute conferring on the court the power to allow the guardian to execute such mortgage. *Laffranchini v. Clark*, 48.

See **LIMITATION OF ACTIONS**, 1.

**GUARDIANS.** See **JUSTICES OF THE PEACE**, 3.

## HABEAS CORPUS.

## 1. ERRONEOUS VERDICT—DISCHARGE.

Though a verdict may be so erroneous as to warrant reversal without being entirely void, it will not authorize discharge on *habeas corpus* of one sentenced thereunder. *Ex Parte Booth*, 183.

## 2. EXTRADITION—EXTENT OF REVIEW.

In hearing an application for *habeas corpus* seeking the petitioner's release from the custody of an agent of another state requisitioning the petitioner as a criminal, the court will go behind the executive warrant of such other state and inquire into the sufficiency of the papers constituting the requisition. *In Re Overfield*, 30.

## 3. FUGITIVE FROM JUSTICE—INNOCENCE—CONCLUSIVE SHOWING—DISCHARGE.

Where in *habeas corpus* proceedings brought by one held for extradition as a fugitive from the justice of another state the evidence, including that of the complaining witness, shows conclusively that the crime charged could not have been committed, and hence that petitioner could not have been a fugitive from justice, the petitioner will be discharged. *Ex Parte La Vere*, 214.

## 4. FUGITIVE FROM JUSTICE—JUDICIAL INQUIRY.

Where by *habeas corpus* a petitioner seeks release from an executive warrant issued upon the requisition for extradition of the governor of a demanding state, on the ground that he is not a fugitive from justice of the demanding state, the court will inquire into the existence of the facts determinative of that issue. *Idem*.

## 5. REGULARITY OF CONVICTION—PRESUMPTION.

On *habeas corpus* to secure the release of one convicted of a misdemeanor in district court on appeal from justice court, it will be presumed that the proceedings in the district court were in every way regular until the contrary is made affirmatively to appear. *Ex Parte Murray*, 351.

## 6. SCOPE OF INQUIRY—EXAMINATION OF WITNESS.

In a *habeas corpus* proceeding, it is not the province of the supreme court to determine to what extent the direct evidence of the witness given before the examining magistrate was weakened or modified by the cross-examination, since that was the province of the examining magistrate. *Ex Parte Molino*, 360.

## 7. VOLUNTARY SURRENDER TO SHERIFF—EXTRADITION.

A petitioner for *habeas corpus* could surrender himself to a sheriff of a county of the state in order to protect himself from being summarily removed from the state on the requisition of the governor of another state by an agent of such other state without opportunity to appeal to the courts for review of the matters of law pertaining to the extradition, the agent of the other state to petitioner's knowledge having the intent so to remove him; therefore such petitioner was properly in the custody of the sheriff. *In Re Overfield*, 30.



"HARBOR AND PROTECT." See CRIMINAL LAW, 20.

HARMLESS ERROR. See CRIMINAL LAW, 10, 11, 31.

#### HOMESTEAD.

##### 1. INTEREST OF WIFE—PROTECTION.

Const. art. 4, sec. 30, declares that a homestead shall be exempt from forced sale and shall not be alienated without the joint consent of the husband and wife. Stats. 1865, c. 72, sec. 1, passed pursuant to the constitution, provides that a homestead selected by the husband and wife shall be exempt from forced sale, and that the selection shall be made by the recordation of a declaration of intent. Const. art. 4, sec. 31, declares that all property of the wife owned before marriage shall be her separate property. The act of 1873, passed pursuant to the constitution, provides in section 1 (Rev. Laws, 2155) that all property of the wife owned before marriage and acquired thereafter by gift, bequest, devise, or descent is her separate property, and that property similarly acquired by the husband should be his separate property, while section 2 (section 2156) declares that all other property acquired during the marriage shall be the community property. Section 6, as amended in 1897 (section 2160), declares that the husband has entire control over the community property, with absolute power of disposition, but that no deed of conveyance or mortgage of a homestead, regardless of whether a declaration has been filed or not, shall be valid for any purpose, unless both the husband and wife execute and acknowledge it. *Held*, that though the homestead was not registered as required by law, the husband's sole conveyance or incumbrance of it cannot pass title. *Nat. Bank of Ely v. Meyers*, 235.

HOMICIDE. See CRIMINAL LAW, 7, 10, 12, 13, 14, 17, 18, 31.

#### HUSBAND AND WIFE.

##### 1. COMMUNITY ESTATE—RIGHT TO CONTROL.

As a general proposition, by reason of the husband's sole right to control the community property, he may alienate during the coverture, without the consent of the wife, any property belonging to the community. *Nat. Bank of Ely v. Meyers*, 235.

See HOMESTEAD, 1.

IMPEACHMENT. See WITNESSES, 2.

IMPROPER QUESTION. See CRIMINAL LAW, 18.

INADVERTENCE. See APPEAL AND ERROR, 26.

INADVERTENT OMISSION FROM TRANSCRIPT. See CRIMINAL LAW, 1.

INCOME. See WILLS, 4, 5, 7.

INCONSISTENT STATEMENTS. See WITNESSES, 2.

INDEBTEDNESS. See MUNICIPAL CORPORATIONS, 1.

INDICTMENT AND INFORMATION.

1. COMPLAINT—INFORMATION AND BELIEF—WAIVER OF DEFECT.

The defect that a complaint, charging the relator with a misdemeanor, was insufficient because purporting to be made upon information and belief, instead of upon positive knowledge, was not jurisdictional, and was waived by relator by pleading to the complaint without making an objection upon the ground assigned. *Ex Parte Murray*, 351.

INDUCEMENT OR PERSUASION. See CRIMINAL LAW, 20.

INFANT. See GUARDIAN AND WARD, 1.

INFERENCE FROM FACTS. See CRIMINAL LAW, 13.

INJUNCTION. See DISMISSAL AND NONSUIT, 3.

INJURIES TO SERVANT. See EVIDENCE, 3; MASTER AND SERVANT, 1, 2.

INNOCENCE. See HABEAS CORPUS, 3.

INQUIRY. See HABEAS CORPUS, 4, 6.

INSANE PERSONS. See JUSTICES OF THE PEACE, 3.

INSTRUCTIONS TO JURY. See CRIMINAL LAW, 15, 16; TRIAL, 1, 2, 3, 4, 5, 6, 7.

INSUFFICIENCY OF EVIDENCE. See APPEAL AND ERROR, 18, 22; CRIMINAL LAW, 3.

INTENDMENT. See STATUTES, 3, 4, 5, 6, 7, 8.

INTENT. See CRIMINAL LAW, 12; HOMESTEAD, 1.

INTENTION OF TESTATOR. See WILLS, 2, 5.

INTEREST OF WIFE. See HOMESTEAD, 1.

INTERMEDDLER. See SUBROGATION, 1.

INTERMEDIATE INCOME. See WILLS, 7.

INTERPRETATION. See WILLS, 2.

INTOXICATION. See ACKNOWLEDGMENT, 1; MORTGAGES, 1, 2, 5.

INVALIDITY. See STATUTES, 9.

IRREVOCABLE LICENSE. See WATER AND WATERCOURSES, 1.

IRRIGATION. See WATER AND WATERCOURSES, 1.

ITEMS OF COST. See COSTS, 3, 4.

JITNEY BUSSES. See LICENSES, 2, 3; MUNICIPAL CORPORATIONS, 2.

JOINT CONSENT. See HOMESTEAD, 1.

JOINT PRINCIPAL. See CRIMINAL LAW, 6, 17, 18; WITNESSES, 3.

## JUDGMENT.

### 1. COLLATERAL ATTACK—ERROR IN JURISDICTION.

Where the court had jurisdiction both over the subject-matter and the defendant in a mechanic's lien suit, its failure to enter an order consolidating with the suit a subsequent suit against the same defendant was merely an error in the exercise of jurisdiction, if it was the duty of the court so to consolidate, which could be asserted on appeal only, and not in an independent action. *Daly v. Lahontan Mines Co.*, 14.

### 2. COLLATERAL ATTACK—JURISDICTION.

A collateral attack upon a judgment is only permissible when the judgment is void for want of jurisdiction, and not if the court merely errs in some ruling. *Idem*.

### 3. CONCLUSIVENESS—PRIVITY—POSSESSION OF PROPERTY—PERSONS BOUND.

Under the rule that judgments are conclusive and binding not only on the parties to the action in which it was rendered, but on persons in privity with them in respect to the subject-matter of the litigation, where after possession of a car had passed from P. to C., and in an action by B. against C. it had been attached and judgment rendered for B., a bill of sale of the car was given by P. to I., the judgment is admissible to show title and right of possession in B. in replevin for the car by I. against B. *Bank of Italy v. Burns*, 326.

### 4. JUDGMENT ROLL—MATTERS INCLUDED.

A judgment roll includes the pleadings and judgment. *Glock v. Elges*, 415.

See FORCIBLE ENTRY AND DETAINER, 1; MECHANICS' LIENS, 7; SALES, 1.

JUDGMENT ROLL. See APPEAL AND ERROR, 1.

JUDICIAL INQUIRY. See HABEAS CORPUS, 4, 6.

JURISDICTION. See APPEAL AND ERROR, 8, 26; CERTIORARI, 2, 3; CRIMINAL LAW, 7, 29; EXTRADITION, 1; INDICTMENT AND INFORMATION, 1; JUDGMENT, 1, 2; JUSTICES OF THE PEACE, 4.

JURY. See LIBEL AND SLANDER, 2, 3; MASTER AND SERVANT, 1; TRIAL, 6.

## JUSTICES OF THE PEACE.

### 1. APPEAL—JUSTIFICATION OF SURETIES—STATUTE.

Where the sureties' sufficiency is not excepted to within five days, as required by Rev. Laws, 5792, the district court acquires jurisdiction, notwithstanding that two days later appellant admits due service of such exceptions before the justice has certified the case. *Yowell v. District Court*, 423.

### 2. APPEAL—JUSTIFICATION OF SURETIES—STATUTE.

Under Rev. Laws, 5792, providing that an appeal from a justice to a district court will be regarded as if no undertaking

**JUSTICES OF THE PEACE—Continued.**

was given, unless the sureties, when challenged, justify after notice, etc., *held* that their justification in the prescribed manner is essential to the district court's jurisdiction, where their sufficiency was properly challenged. *Idem*.

**3. CIVIL JURISDICTION—CHARACTER OF PARTIES—GUARDIANS.**

Under Const. art. 6, secs. 6-8, providing that district courts shall have jurisdiction in all cases where the demand exceeds \$300 and all cases relating to the persons and estates of minors and insane persons, and giving the legislature power to fix the powers of justices of the peace, provided they shall not have jurisdiction conflicting with that of courts of record, and Rev. Laws, 5714, 5726, conferring jurisdiction upon justices' courts in actions on contract for the recovery of money only where the demand is not over \$300, and providing for appearance by general guardian or guardian *ad litem* of an infant or insane person in justice's court, a justice's court has jurisdiction in actions at law brought by the guardian of a minor where the amount involved does not exceed \$300. *Killgrove v. Morris*, 224.

**4. JURISDICTION—STATUTE.**

Under civil practice act, section 812, governing trials and judgments in the justice court, and providing that where the defendant fails to answer within the time specified in the summons, the court may render judgment in favor of the plaintiff, where the plaintiff appeared specially and filed a motion to dismiss the complaint, but did not answer, the justice did not exceed his jurisdiction in entering a default against a defendant and denying him time to answer after the time prescribed by law had expired. *Regan v. King*, 216.

**5. STATUTORY PROVISIONS—CONSTRUCTION—ANSWER.**

Since the civil practice act, section 294 (Rev. Laws, 5236), providing for entry of judgment for the plaintiff where defendant fails to answer, and that an answer shall include any pleading that raises an issue of law or fact, whether by general or special appearance, is not made applicable to justices' courts by reason of civil practice act, sec. 873 (Rev. Laws, 5815), providing that only the provisions of the act which are in their nature, or which have been made, applicable, are applicable to justices' courts and the proceedings therein, because civil practice act, sec. 812 (Rev. Laws, 5754), sets forth a separate and complete system governing trials and judgments in the justice court, similar to the system prescribed by section 294; and when a separate and independent section is found in the practice act covering the matter of pleading in the justice court, it must be construed that the legislative intent was to limit the provisions of section 294 to the district court; the relator's special appearance challenging the jurisdiction of the justice court was not affected by the provisions of section 294 and was not an answer. *Idem*.

**LABOR LIENS.** See **MECHANICS' LIENS**, 4, 5.

LACHES. See APPEAL AND ERROR, 20; DISMISSAL AND NONSUIT, 1, 2, 3.

#### LANDLORD AND TENANT.

##### 1. UNLAWFUL DETAINER—TREBLE DAMAGES.

Rev. Laws, 5599, concerning unlawful detainer and providing that "judgment shall be rendered against the defendant \* \* \* for the rent and for three times the amount of damages assessed," does not clearly authorize the trebling of the amount of rent found due, as the statute mentions other elements of damage, such as waste, and while the legislature has used language to indicate that in some way treble damages are to be recovered from tenants holding over, the statute having failed to show what damages should be trebled, as penalties and forfeitures will not be extended by implication and doubtful construction, no such judgment can be rendered against a tenant holding over. *Regan v. King*, 216.

LEAVE OF COURT. See CRIMINAL LAW, 22.

"LEGACY." See WILLS, 6.

LEGAL TITLE. See MORTGAGES, 4.

LEGISLATIVE INTENT. See JUSTICES OF THE PEACE, 5; STATUTES, 3, 4, 5, 6, 7, 8.

LIABILITY. See FORCIBLE ENTRY AND DETAINER, 2.

LIABILITY OF PURCHASER'S ASSIGNEE. See VENDOR AND PURCHASER, 2.

#### LIBEL AND SLANDER.

##### 1. OFFENSES—DEGREES.

Rev. Laws, 6428, declaring that every person convicted of libel shall be fined in a sum not exceeding \$5,000 or imprisoned in the county jail not exceeding one year, or in the state prison not exceeding five years, divides the crime of libel into two offenses, one a felony, and the other a misdemeanor. *Ex Parte Booth*, 183.

##### 2. OFFENSES—PROVINCE OF JURY.

Under Rev. Laws, 6428, declaring that every person convicted of libel shall be fined in a sum not exceeding \$5,000, or imprisoned in the county jail not exceeding one year, or in the state prison not exceeding five years, and that the jury shall have the right to determine the law and the fact, together with section 7196, also declaring that the jury shall have the right to determine the law and the fact, the determination whether a libel is a felony or a misdemeanor is for the jury. *Idem*.

##### 3. OFFENSES—VERDICT.

Rev. Laws, 6428, declares that the punishment for libel shall be fine and imprisonment in the county jail, or imprisonment in the penitentiary, and that the jury shall be the judge of the law and the fact. Section 7196 makes similar provision.

## LIBEL AND SLANDER—Continued.

Sections 7216 and 7218 declare that a verdict on a plea of not guilty shall be either guilty or not guilty, and that, if a crime is distinguished into degrees, the jury must find the degree, while sections 7221 and 7222 provide for the reconsideration of an informal verdict, and that no judgment of conviction shall be given unless the jury find expressly against the defendant. In a prosecution for libel the verdict was: "We, the jury, \* \* \* find the defendant \* \* \* guilty of a gross misdemeanor." Held that, as the jury were entitled to find the grade of the offense, and as the whole record might be looked to, the verdict was not so indefinite that a judgment entered thereon was void; such verdict indicating the degree of the offense of which accused was convicted. *Idem*.

LICENSE. See WATER AND WATERCOURSES, 1.

## LICENSES.

## 1. POWER TO LICENSE OR TAX—STATUTE—"UNINCORPORATED TOWNS."

The proviso to Stats. 1881, c. 48, added by Stats. 1889, c. 43, reading that in all unincorporated cities and towns the board of county commissioners shall have power to fix and collect a tax upon certain businesses and amusements, and none other, does not apply to towns which established their form of government after the unincorporated town act (Stats. 1879, c. 98) had been repealed by Stats. 1887, c. 43, or to towns which, by reason of their having a voting population of 600 or more, *ipso facto* come under the general town government act, the term "unincorporated towns" not referring to all towns within the state not incorporated; as to give it such an interpretation would nullify the grant by the legislature in the body of the act of power to boards of county commissioners to levy and collect a license tax upon numerous specific businesses, but referring specifically to towns which have assumed a form of town government under the act of 1879 entitled "An act to provide for the government of unincorporated towns in this state." *Nye County v. Schmidt*, 456.

## 2. POWERS OF CITY COUNCIL—JITNEY BUSES.

Under Reno City Charter, art. 12, sec. 10, subd. 12, as amended by Stats. 1915, c. 184, giving the city council power to impose a license tax on and regulate hacks, hackney coaches, and "all other vehicles used for hire," the city council had authority to pass an ordinance licensing and regulating the operation of jitney buses. *Ex Parte Counts*, 61.

## 3. REASONABLENESS—AMOUNT.

A city ordinance licensing jitney buses and regulating the tax according to the seating capacity, was not invalid as failing to comply with the charter provision that all licenses should be graduated according to the amount of business done. *Idem*.

See MUNICIPAL CORPORATIONS, 2.

LIEN. See CONTINUANCE, 1; JUDGMENT, 1.

**LIEN CLAIMANTS.** See **MECHANICS' LIENS**, 6, 7.

**LIFE SENTENCE.** See **CRIMINAL LAW**, 7.

**LIMITATIONS OF ACTIONS.**

**1. PART PAYMENT—RIGHTS OF SUBROGATION.**

Though the mortgage given by a guardian for herself and on behalf of her minor ward was invalid for the reason that the order of the probate court, directing the execution of the mortgage, was without statutory authority, the proceeds of the mortgage having been applied to the satisfaction of a valid existing mortgage, a payment of interest on the invalid mortgage will be applied on the former mortgage for the purpose of tolling the statute of limitations in favor of the right of the second mortgagee to enforce the prior mortgage by way of subrogation. *Laffranchini v. Clark*, 48.

**2. SUIT TO FORECLOSE MORTGAGE.**

A mortgage being a mere incident to the debt secured, an action to foreclose the mortgage is barred at the expiration of six years from the maturity of the note secured under Comp. Laws, 3718, providing that actions upon contracts and obligations founded upon instruments in writing must be brought within six years. *Idem*.

**LIVE STOCK.** See **ANIMALS**, 1.

**MASTER AND SERVANT.**

**1. INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.**

In a miner's action for injuries from a falling rock, evidence held to make the question as to whether he himself loosened it one for the jury. *Zelavin v. Tonopah Belmont*, 1.

**2. PLACE OF WORK—ASSUMPTION OF RISK.**

Where a servant is employed in performing labor which necessarily changes the character of the place for safety as the work progresses, and is consequently likely to become dangerous at any time, he assumes the risk. *Idem*.

**MATTERS INCLUDED IN JUDGMENT ROLL.** See **JUDGMENT**, 4.

**MATTERS NOT AT ISSUE.** See **APPEAL AND ERROR**, 25.

**MATTERS OUTSIDE OF RECORD.** See **APPEAL AND ERROR**, 9.

**MAXIMS OF EQUITY.** See **EQUITY**, 1.

**"MAY."** See **FORCIBLE ENTRY AND DETAINER**, 4.

**MEASURE OF DAMAGES.** See **ANIMALS**, 1.

**MECHANICS' LIENS.**

**1. CONSTRUCTION OF STATUTE.**

While the mechanics' lien law should be liberally construed, it is a creature of statute; and, to enable one to acquire and enforce a right under it, there must be a substantial compliance with the statute. *Daly v. Lahontan Mines Co.*, 14.

**MECHANICS' LIENS—Continued.****2. ENFORCEMENT—CONSOLIDATION OF SUITS—STATUTE.**

Under Rev. Laws, sec. 2224, relating to consolidation of lien claims, a lien suit instituted by a labor lien claimant, in which others joined, should have been consolidated with other and prior suits against the same defendant. *Idem.*

**3. FORECLOSURE—CONSOLIDATION OF ACTIONS—CONTINUANCE.**

In suit to foreclose liens, the court, of its own motion, could have consolidated all lien actions pending, heard the proofs in the first action, and granted reasonable continuance for hearing of proofs in the others. *Idem.*

**4. PRIORITY—STATUTE.**

By Rev. Laws, sec. 2223, labor liens are preferred claims, and entitled to be paid out of the proceeds of the sale of the property in advance of other classes of lien claimants. *Idem.*

**5. PRIORITY—WAIVER.**

Revised Laws, sec. 2223, provides that, wherever liens are asserted against any property, the court in the judgment must declare their rank, placing liens for labor first. Section 2227 provides that, at the time of filing the complaint and issuing the summons in a lien action, the plaintiff shall notify all persons claiming liens on the premises to exhibit proof of their liens to the court. A mechanic's lienor for labor failed to exhibit his lien in a prior lien suit. *Held* that, so far as the plaintiffs in such suit and those who did exhibit their liens were concerned, he had waived his right under the statute to priority as a labor lienor. *Idem.*

**6. PROTECTION OF CLAIMANTS.**

The procedure under the mechanics' lien statute should be liberal to the end of protecting the rights of all lien claimants. *Idem.*

**7. PROTECTION OF CLAIMANTS.**

Trial courts, in actions to foreclose liens, where it appears there are other lien claimants and particularly that other suits are pending for the foreclosure of such other liens, should endeavor to protect the rights of all claimants in one judgment. *Idem.*

**8. RIGHT OF REDEMPTION FROM JUDGMENT.**

Two judgments were entered against a corporation in separate mechanic's lien actions, and the property sold under each judgment. The successor of the purchaser under the second judgment lost his right to the property as a redemptioner, when he failed to redeem from the first judgment within the statutory time, and before the issuance of the sheriff's deed to the purchaser thereunder. *Idem.*

**9. TIME FOR FILING.**

Where the original contract for the alteration and repair of a building under which a mechanic's lien was sought to be foreclosed contemplated only certain repairs, but there was no time limit during which they should be done, and other and additional repairs were made at various times, con-



tinuing for a period of several months, a notice of mechanic's lien filed within six months of the completion of the last work of repair was filed in time; the contract being a continuing contract, although during the time there were several times at which the plaintiff was not actively engaged in the repairs. *Gaston v. Avansino*, 128.

10. TIME FOR FILING—FRAUD.

Evidence held insufficient to show that the contract was performed in a certain month, so as to make invalid a notice filed more than six months thereafter. *Idem*.

11. TIME FOR FILING—FRAUD.

In such case evidence held not to show fraudulent intent in making the final repairs so as to permit filing of lien after it should have expired. *Idem*.

12. WAIVER—EVIDENCE—SUFFICIENCY.

Under the rule that one holding a lien will not be held to have waived it by an ambiguous agreement, evidence held insufficient to show a waiver of a mechanic's lien. *Idem*.

13. WAIVER—STATUTE.

Under Rev. Laws, sec. 2227, providing that, at the time of filing the complaint and issuing the summons in a lien action, the plaintiff shall notify all persons claiming liens to exhibit proof, and that all liens not exhibited shall be deemed to be waived in favor of those exhibited, in an original lien suit, where no proofs were offered of liens involved in another and subsequent lien suit, no request made for consolidation of suits, and no appeal taken from the order refusing a continuance to the other lien claimants for the presentation of proofs, there was a waiver in favor of the liens involved in the original suit. *Daly v. Lahontan Mines Co.*, 14.

See APPEAL AND ERROR, 24; CONTINUANCE, 1; EVIDENCE, 2; JUDGMENT, 1.

MEMORANDUM OF EXCEPTIONS. See APPEAL AND ERROR, 5, 8.

MEMORY. See CRIMINAL LAW, 31.

MENTAL CAPACITY. See ACKNOWLEDGMENT, 1; MORTGAGES, 1, 2, 5.

MILEAGE OF WITNESSES. See COSTS, 2.

MINES AND MINERALS.

1. EXTRALATERAL RIGHTS—ANTICLINAL FOLD VEIN—"APEX."

Within Rev. Stats. U. S. 2322, giving extralateral rights as to veins the tops or apexes of which are within the surface lines of the located claim, the crest of a vein in the form of anticlinal fold is the apex; a terminal edge not being necessary for an apex. *Jim Butler Co. v. West End Co.*, 375.

2. EXTRALATERAL RIGHTS—END LINES.

As regards extralateral rights under Rev. Stats. U. S. 2322 (U. S. Comp. Stats. 1913, 4618), where a patented mining location is in the form of a parallelogram, except for the exclusion, for conflict, of a triangular piece at a corner, the remainder of

**MINES AND MINERALS—Continued.**

what would have been the end line but for such exclusion is the end line; the interior line of the excluded triangle being one, or a part of one, of the side lines, and not part of a broken end line. *Idem.*

**3. EXTRALATERAL RIGHTS—OPPOSITE DIRECTIONS.**

Rev. Stats. U. S. 2322, limiting extralateral rights to the part of a vein between vertical planes drawn downward through the end lines, continued "in their own direction," does not negative extralateral rights in opposite directions; the end lines having two directions. *Idem.*

See APPEAL AND ERROR, 9; EVIDENCE, 3; MASTER AND SERVANT, 1, 2; TRIAL, 1.

**MINORS.** See JUSTICES OF THE PEACE, 3; LIMITATION OF ACTIONS, 1.

**MISCONDUCT.** See CRIMINAL LAW, 18.

**MISDEMEANOR.** See HABEAS CORPUS, 5; LIBEL AND SLANDER, 1, 2, 3.

**MISLEADING INSTRUCTIONS.** See TRIAL, 2, 3.

**MODIFICATION OF JUDGMENT.** See FORCIBLE ENTRY AND DETAINER, 1.

**"MOOT CASE."** See APPEAL AND ERROR, 10.

**MORTGAGES.****1. EXECUTION—CAPACITY OF PARTIES—EVIDENCE.**

Evidence held insufficient to show that a mortgagor was mentally incapacitated by intoxication at the time of drawing a mortgage. *Seeley v. Goodwin*, 315.

**2. EXECUTION—CAPACITY OF PARTIES—INTOXICATION—EVIDENCE.**

The mere fact that signatures to a note and mortgage were poorly made is insufficient to show that the maker was intoxicated. *Idem.*

**3. FORECLOSURE—APPEAL—NECESSARY PARTIES.**

In suit to foreclose a mortgage, a subsequent purchaser whose right was defeated by execution sale, and the execution purchaser and his grantee, who had deeded the land to one defendant, were not necessary parties to an appeal, which would not be dismissed on that ground. *Idem.*

**4. MORTGAGEE'S RIGHT.**

In a mortgage legal title is in the mortgagor, and the mortgagee holds only an equitable lien. *Southern Pacific Co. v. Miller*, 169.

**5. VALIDITY—CAPACITY OF PARTIES—WHO MAY ATTACK—DEGREE OF PROOF.**

Assuming that a subsequent purchaser of the mortgagor may assert the mortgagor's incapacity owing to intoxication at the time of drawing the mortgage, the degree of proof required to show such incapacity on his part is at least equal to that required from one asserting his own incapacity. *Seeley v. Goodwin*, 315.

See GUARDIAN AND WARD, 1; HOMESTEAD, 1; LIMITATION OF ACTIONS, 1, 2; SUBROGATION, 1.

MOTION FOR CONTINUANCE. See APPEAL AND ERROR, 13, 14.

MOTION TO DISMISS. See APPEAL AND ERROR, 11, 20, 21; DISMISSAL AND NONSUIT, 1; JUSTICES OF THE PEACE, 4. ..

MOTOR VEHICLES. See MUNICIPAL CORPORATIONS, 2.

#### MUNICIPAL CORPORATIONS.

1. POWERS—INDEBTEDNESS—"GREAT NECESSITY OR EMERGENCY."

Rev. Laws, 978, providing that in cases of great necessity or emergency, the governing body of a town or city may, by unanimous vote and with the approval of the state board of revenue, authorize a temporary loan to meet such necessity or emergency, does not authorize a city organized under a special charter, which as amended by Stats. 1907, cc. 29, 146, gave the trustees power to improve its streets and to issue bonds subject to the right of the voters to petition for a special election on the question, to make a temporary loan to pay for the paving of street intersections on its main street, since "great necessity or emergency" means something greatly out of the ordinary, which could not be met by the usual machinery of the government, immediately indispensable, and does not include what is merely essential in the sense of being convenient. *Chartz v. Carson City*, 285.

2. POWERS—LICENSES—JITNEY BUSES.

Stats. 1913, c. 206, regulating automobiles or motor vehicles on public roads and streets, providing a license for the operation thereof, and in section 15 providing that the act shall in no wise affect any statute now existent nor that may hereafter be enacted providing for the licensing of automobiles for hire, does not interfere with the power of a city to license and regulate the use of jitney busses. *Ex Parte Counts*, 61.

MURDER. See CRIMINAL LAW, 7, 10, 12, 13, 14, 17, 18, 31.

NECESSARY PARTIES. See MORTGAGES, 3, 5.

"NEGATIVE TESTIMONY." See EVIDENCE, 2.

NEGLECT. See DISMISSAL AND NONSUIT, 1, 2.

NEW STATEMENT ON APPEAL. See APPEAL AND ERROR, 26.

NEW TRIAL. See APPEAL AND ERROR, 5.

NIGHTTIME. See CRIMINAL LAW, 4.

NOMINATIONS. See CONSTITUTIONAL LAW, 1, 2.

"NOT GUILTY." See CRIMINAL LAW, 21, 22.

NOTARY'S CERTIFICATE. See ACKNOWLEDGMENT, 1.

NOTICE. See MECHANICS' LIENS, 9, 10, 13.

- NOTICE DISCLAIMING LIABILITY. See APPEAL AND ERROR, 24.
- NOTICE OF APPEAL. See APPEAL AND ERROR, 28, 29.
- OBJECTION. See INDICTMENT AND INFORMATION, 1.
- OBJECTIONS TO COST BILL. See CERTIORARI, 1, 2; COSTS, 4.
- OBTAINING INJUNCTION. See DISMISSAL AND NONSUIT, 3.
- OFFENSES. See LIBEL AND SLANDER, 1, 2, 3.
- OFFERS OF CLEMENCY. See WITNESSES, 3.
- OFFSETS TO CLAIMS AGAINST ESTATES. See EXECUTORS AND ADMINISTRATORS, 1, 2, 3.
- OPPOSITE DIRECTIONS. See MINES AND MINERALS, 3.
- ORDER OF PLEADING. See CRIMINAL LAW, 22.
- ORDERS. See APPEAL AND ERROR, 2, 12.
- ORDERS REVIEWABLE. See APPEAL AND ERROR, 13, 14, 16.
- "OTHER HEAD" OF CORPORATION. See CORPORATIONS, 1.
- OWNERSHIP. See PROPERTY, 1.
- PART PAYMENT. See LIMITATION OF ACTIONS, 1.
- PARTIAL INVALIDITY. See STATUTES, 9.
- PARTICULARITY. See EXECUTORS AND ADMINISTRATORS, 3.
- PARTIES PLAINTIFF. See FORCIBLE ENTRY AND DETAINER, 2.
- PARTIES TO OFFENSE. See CRIMINAL LAW, 19, 20.
- PARTY AFFILIATION. See ELECTIONS, 2.
- PERSONAL ACTION. See VENDOR AND PURCHASER, 3.
- PERSONAL INJURY. See TRIAL, 5; WITNESSES, 1.
- PERSONS BOUND. See JUDGMENT, 3.
- PERSUASION OR INDUCEMENT. See CRIMINAL LAW, 20.
- PLACE OF WORK. See MASTER AND SERVANT, 2.
- PLEA. See CRIMINAL LAW, 2, 21, 22; INDICTMENT AND INFORMATION, 1.
- PLEA IN ABATEMENT. See CRIMINAL LAW, 22.
- PLEADING. See CRIMINAL LAW, 22; FORCIBLE ENTRY AND DETAINER, 2; JUSTICES OF THE PEACE, 5.
- POSITIVE KNOWLEDGE. See INDICTMENT AND INFORMATION, 1.
- POSITIVE TESTIMONY. See CRIMINAL LAW, 13; EVIDENCE, 2.

POSSESSION. See FORCIBLE ENTRY AND DETAINER, 2, 3; JUDGMENT, 3.

POSSESSION OF STOLEN PROPERTY. See CRIMINAL LAW, 19.

POSTING NOTICE. See APPEAL AND ERROR, 24.

POWER TO LICENSE. See LICENSES, 1, 2.

POWER TO PUNISH. See CRIMINAL LAW, 7.

POWERS. See MUNICIPAL CORPORATIONS, 1, 2.

PREFERRED CLAIMS. See MECHANICS' LIENS, 4, 5.

PRELIMINARY EXAMINATION. See CRIMINAL LAW, 22, 23, 24, 25, 26.

PRELIMINARY PROOF OF CONFESSION. See CRIMINAL LAW, 8.

PRESUMPTION. See APPEAL AND ERROR, 15, 21; HABEAS CORPUS, 5; QUIETING TITLE, 1.

PRESUMPTION OF LAW. See CRIMINAL LAW, 12.

PRESUMPTION OF OWNERSHIP.

1. BILL OF SALE.

While presumption of ownership which flows from possession may be overcome by showing that some person other than the one in possession is the real owner, the mere introduction in evidence of an alleged bill of sale by a claimant of the property not in possession does not tend to give such claimant a stronger title than could have been asserted by the original consignor of the property who executed the bill of sale. *Bank of Italy v. Burns*, 326.

PRIMARY ELECTIONS. See CONSTITUTIONAL LAW, 1, 2; ELECTIONS, 1, 2.

PRINCIPAL. See CRIMINAL LAW, 17, 18.

PRIORITY. See MECHANICS' LIENS, 4, 5.

PRIVITY. See JUDGMENT, 3; SALES, 1.

PROBABLE CAUSE. See CRIMINAL LAW, 26.

PROCESS. See CORPORATIONS, 1.

PROOF. See MORTGAGES, 5.

PROOF OF CORPUS DELICTI. See CRIMINAL LAW, 13, 14.

PROPERTY.

1. POSSESSION AS EVIDENCE OF OWNERSHIP.

The circumstances surrounding the passing of possession of a car from consignor to consignee not being disclosed, a presumption of law is raised, under the rule that possession of property is *prima facie* proof of ownership. *Bank of Italy v. Burns*, 326.

PROPERTY OF INFANT. See HOMESTEAD, 1.

PROTECTION OF CLAIMANTS. See MECHANICS' LIENS, 6, 7.

PROTECTION OF WIFE. See HOMESTEAD, 1.

PUBLIC LANDS.

1. CHARACTER—DETERMINATION BY LAND OFFICE.

The determination by the federal land department of the character of public lands is conclusive, except in certain direct proceedings to set aside a patent for fraud, imposition, mistake, or the like. *Earl v. Morrison*, 120.

PURCHASER. See VENDOR AND PURCHASER, 1, 2, 3.

QUALIFIED ELECTORS. See ELECTIONS, 1, 3.

QUESTIONS FOR JURY. See MASTER AND SERVANT, 1.

QUESTIONS REVIEWABLE. See APPEAL AND ERROR, 16.

QUIETING TITLE.

1. BASIS OF ACTION—TITLE.

Plaintiff, not claiming any title to realty, but seeking a decree directing that a sheriff convey to him real property sold under a judgment, the plaintiff being the purchaser's successor, cannot maintain an action to quiet title, which is based on the presumption that plaintiff has title. *Daly v. Lahontan Mines Co.*, 14.

REAL ESTATE. See FORCIBLE ENTRY AND DETAINER, 3.

REASONABLE OR PROBABLE CAUSE. See CRIMINAL LAW, 26.

REASONABLENESS. See LICENSES, 3.

RECORD ON APPEAL. See APPEAL AND ERROR, 9, 15, 16, 17, 21.

RECORDATION. See HOMESTEAD, 1.

RECOVERY OF PURCHASE MONEY. See VENDOR AND PURCHASER, 3.

REDEMPTION. See MECHANICS' LIENS, 8.

REDIRECT EXAMINATION. See WITNESSES, 3.

REFRESHING MEMORY. See CRIMINAL LAW, 31.

REGISTRATION. See ELECTIONS, 1, 2.

REGULARITY OF CONVICTION. See HABEAS CORPUS, 5.

REJECTED CLAIMS AGAINST ESTATES. See EXECUTORS AND ADMINISTRATORS, 2, 3.

REMARK OF TRIAL COURT. See CRIMINAL LAW, 10.

REMEDIES OF VENDOR. See VENDOR AND PURCHASER, 1, 2, 3.

REPEALED ACT. See STATUTES, 1.

REPLEVIN. See JUDGMENT, 3.

REQUEST FOR INSTRUCTIONS. See CRIMINAL LAW, 15; TRIAL, 4, 5.

REQUISITION FOR EXTRADITION. See HABEAS CORPUS, 4, 7.

RES GESTÆ. See CRIMINAL LAW, 9.

"RESIDUARY BEQUEST." See WILLS, 3, 7.

"RESIDUARY LEGATEE." See WILLS, 3, 6.

"RESIDUE." See WILLS, 3.

RESTORATION OF APPEAL. See APPEAL AND ERROR, 6.

RETAXING COSTS. See COSTS, 5.

REVIEW. See APPEAL AND ERROR, 18, 19, 20, 21, 22, 23, 24, 25; CRIMINAL LAW, 2, 3; HABEAS CORPUS, 2.

RIGHT TO CONTROL COMMUNITY ESTATE. See HUSBAND AND WIFE, 1.

RIGHT TO POSSESSION. See FORCIBLE ENTRY AND DETAINER, 2, 3; JUDGMENT, 3.

RIGHT TO VOTE. See ELECTIONS, 2, 3.

RIGHTS OF HEIRS. See WILLS, 6.

RIGHTS OF MORTGAGEE. See MORTGAGES, 4.

RIGHTS OF SUBROGATION. See LIMITATION OF ACTIONS, 1.

RISK. See MASTER AND SERVANT, 2.

RULES. See EVIDENCE, 3.

SALES.

1. JUDGMENT—PRIVITY.

The purchaser who acquires property after suit brought in which title to the property is involved is privity to the judgment; but, on the other hand, a purchaser of property before such suit is brought is not privity to the judgment. *Bank of Italy v. Burns*, 326.

SATISFACTION IN PART. See APPEAL AND ERROR, 23.

SCOPE OF CROSS-EXAMINATION. See WITNESSES, 1.

SCOPE OF INQUIRY. See HABEAS CORPUS, 6.

SCOPE OF REVIEW. See APPEAL AND ERROR, 24, 25.

SELF-SERVING STATEMENTS. See CRIMINAL LAW, 27.

SEPARATE PROPERTY OF HUSBAND AND WIFE. See HOME-STEAD, 1.

SERVANT. See EVIDENCE, 3.

SERVICE OF PROCESS ON CORPORATION. See CORPORATIONS, 1.

SET-OFFS TO CLAIMS AGAINST ESTATES. See EXECUTORS AND ADMINISTRATORS, 2, 3.

SIDE LINES. See MINES AND MINERALS, 2.

SIGNATURE. See MORTGAGES, 2, 5.

SIMILAR FACTS. See EVIDENCE, 3.

SPECIAL APPEARANCE. See JUSTICES OF THE PEACE, 4, 5.

SPECIAL INSTRUCTIONS. See CRIMINAL LAW, 16.

SPECIFIC INTENT. See CRIMINAL LAW, 12.

STATE MINING INSPECTION RULES. See EVIDENCE, 3.

STATEMENT ON APPEAL. See APPEAL AND ERROR, 8, 12, 17, 26, 27, 29.

STATEMENT TO POLICE. See CRIMINAL LAW, 8, 11.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS, 1, 2.

#### STATUTES.

##### 1. AMENDMENT—AMENDMENT OF REPEALED ACT.

An amendment of a city charter was not invalid because the title of the act purported to amend an act theretofore repealed. *Ex Parte Counts*, 61.

##### 2. CONSTRUCTION.

In construing a statute the court must avoid an interpretation which will result in absurd consequences. *Nye County v. Schmidt*, 456.

##### 3. CONSTRUCTION.

In construing statutes courts must presume a legislative intentment of reasonable operation of all parts of the act. *Idem*.

##### 4. CONSTRUCTION.

Legislative acts should be construed so as to make all parts thereof harmonious, if a reasonable construction can accomplish the result. *Idem*.

##### 5. CONSTRUCTION.

It will not be assumed that one part of a legislative act will make inoperative or nullify another part of the same act, if a different and more reasonable construction can be applied. *Idem*.

##### 6. CONSTRUCTION.

Where the legislative body manifests a definite purpose in an act, it will be presumed that in furtherance of such purpose



the lawmaking power formulated the subsidiary provisions in harmony therewith. *Idem*.

7. CONSTRUCTION—COMMON-LAW SENSE OF WORDS.

Where a statute uses a word which is well known and has a definite sense at common law, without specific definition, it will be presumed to be used in its common-law sense, unless it clearly appears that it was not so intended. *In Re Estate of Lewis*, 445.

8. CONSTRUCTION—TECHNICAL WORDS.

Technical words and phrases having peculiar and appropriate meaning in law are to be understood according to their technical import; but to such rule there is an exception where words are used to express convertible terms in a statute, and where a court, seeking to carry out the legislative will, applies to the terms the meaning that will give the most unrestricted scope to the enactment. *Idem*.

9. PARTIAL INVALIDITY.

The unconstitutionality of one section of a law does not destroy the validity of other provisions which can stand independent of such section. *Turner v. Fogg*, 406.

10. SUBJECTS AND TITLES.

The act of March 29, 1915 (Stats. 1915, c. 283), entitled "An act regulating the nomination of candidates by political parties, providing for the holding of primaries and conventions, and regulating the manner of nominating candidates by petition," does not contravene the constitution, art. 4, sec. 17, providing that each law shall embrace but one subject and matters properly connected therewith, which subject shall be embraced in the title. *Idem*.

See ANIMALS, 1; APPEAL AND ERROR, 1, 2, 7, 26, 27, 28, 29; CONSTITUTIONAL LAW, 1, 2; CONTINUANCE, 1; CORPORATIONS, 1; COSTS, 1, 2, 3; CRIMINAL LAW, 20; ELECTIONS, 3; EXECUTORS AND ADMINISTRATORS, 1; FORCIBLE ENTRY AND DETAINER, 3, 4; JUSTICE OF THE PEACE, 1, 2, 4; LICENSES, 1; MECHANICS' LIENS, 1, 2, 4, 13; WILLS, 6.

STATUTORY PROVISIONS. See JUSTICES OF THE PEACE, 5.

STRIKING COST BILL. See COSTS, 3.

SUBJECTS AND TITLES. See STATUTES, 10.

SUBROGATION.

1. PERSONS ENTITLED—MORTGAGES—VOLUNTEER OR "INTERMEDDLER."

Where a guardian executed a mortgage upon land owned by herself and her minor ward to obtain money to prevent foreclosure under another mortgage running to a third party, the mortgagee was subrogated to the rights of the original mortgagee, where his mortgage was invalid, and the fact that he had no previous interest in the property did not make him a volunteer or intermeddler, a volunteer and intermeddler being a person who thrusts himself into a situation on his own initiative, and not one who becomes a party to a transaction upon the urgent petition of a person who is vitally interested

**SUBROGATION—Continued.**

therein, and whose rights would otherwise be sacrificed. *Laf-franchini v. Clark*, 48.

See LIMITATION OF ACTIONS, 1.

SUBSTANTIAL CONFLICT. See CRIMINAL LAW, 10.

SUBSTANTIAL EVIDENCE. See APPEAL AND ERROR, 18, 19, 22;  
CRIMINAL LAW, 3.

SUBSTANTIAL RIGHTS. See APPEAL AND ERROR, 8.

SUFFICIENCY OF EVIDENCE. See APPEAL AND ERROR, 18, 22;  
CRIMINAL LAW, 4, 5, 14, 23, 24, 26; MECHANICS' LIENS, 12;  
WATER AND WATERCOURSES, 1.

SUFFICIENCY OF REQUISITION PAPERS. See HABEAS CORPUS, 2.

SUFFICIENT TENDER. See VENDOR AND PURCHASER, 1.

SUIT TO FORECLOSE MORTGAGE. See LIMITATION OF ACTIONS, 2.

SUMMARY REMOVAL. See HABEAS CORPUS, 7.

SUNSET AND SUNRISE. See CRIMINAL LAW, 4.

SURETIES. See JUSTICES OF THE PEACE, 1, 2.

SURPRISE. See APPEAL AND ERROR, 26.

SURRENDER. See HABEAS CORPUS, 7.

SWEARING FALSELY. See EVIDENCE, 4.

TAX. See LICENSES, 1, 2.

TAXING WITNESS FEES. See COSTS, 6.

TECHNICAL ERRORS. See CRIMINAL LAW, 10.

TECHNICAL WORDS. See STATUTES, 8.

TENDER OF CONVEYANCE. See VENDOR AND PURCHASER, 1.

TERMINAL EDGE. See MINES AND MINERALS, 1.

TESTIMONY. See EVIDENCE, 2.

TESTIMONY OF ACCUSED. See CRIMINAL LAW, 16.

TESTIMONY OF CONVICTS. See CRIMINAL LAW, 17, 18.

TIME FOR FILING. See MECHANICS' LIENS, 9, 10, 11, 13.

TIME FOR FILING MOTION TO DISMISS APPEAL. See APPEAL  
AND ERROR, 11.

TIME FOR FILING STATEMENT ON APPEAL. See APPEAL AND  
ERROR, 27, 28, 29.

TIME FOR OBJECTION TO COST BILL. See COSTS, 4, 5.

TIME OF PLEADING. See CRIMINAL LAW, 22.

TITLE. See FORCIBLE ENTRY AND DETAINER, 2, 3; MORTGAGES, 4; PRESUMPTION OF OWNERSHIP, 1; QUIETING TITLE, 1; SALES, 1.

TITLES OF ACTS. See STATUTES, 10.

TREBLE DAMAGES. See FORCIBLE ENTRY AND DETAINER, 1, 2, 3, 4; LANDLORD AND TENANT, 1.

TRESPASS. See ANIMALS, 1, 2.

#### TRIAL.

##### 1. INSTRUCTIONS—EVIDENCE TO SUPPORT.

In a miner's action for injuries by a falling rock, an instruction upon the fellow-servant doctrine is erroneous, where there is no evidence to support it. *Zelavin v. Tonopah Belmont*, 1.

##### 2. INSTRUCTIONS—MISLEADING INSTRUCTIONS.

The giving of an instruction, although embodying a correct rule of law, is reversible error, where it has a tendency to mislead the jury. *Idem*.

##### 3. INSTRUCTIONS—MISLEADING INSTRUCTIONS.

A requested instruction, which is misleading, is properly refused. *Idem*.

##### 4. INSTRUCTIONS—NECESSITY OF REQUESTS.

Since the defense of contributory negligence may be abandoned at any time during the trial, it is not obligatory upon the court to give instructions thereon, in absence of request. *Idem*.

##### 5. INSTRUCTIONS—REQUESTS—NECESSITY.

If a defendant in a personal injury action desires an instruction on the question of contributory negligence, he must request it. *Idem*.

##### 6. INSTRUCTIONS—THEORIES OF CASE.

An instruction which takes from the consideration of the jury defendant's theory of the case is erroneous. *Idem*.

##### 7. INSTRUCTIONS—THEORIES OF CASE.

Where the parties on trial each proceeded on a different theory of the case, the court must give instructions applicable to both theories upon request. *Idem*.

See CRIMINAL LAW, 28, 29.

TRIAL COURT. See CRIMINAL LAW, 10, 21.

TRIAL WHILE SERVING SENTENCE. See CRIMINAL LAW, 7.

TRUST. See WILLS, 4.

UNCERTAINTY. See EXECUTORS AND ADMINISTRATORS, 3.

UNCERTAINTY OF VERDICT. See CRIMINAL LAW, 28, 29.

UNDERTAKING ON APPEAL. See APPEAL AND ERROR, 28.

"UNINCORPORATED TOWNS." See LICENSES, 1.

UNLAWFUL DETAINER. See LANDLORD AND TENANT, 1.

UNPROFESSIONAL CONDUCT. See APPEAL AND ERROR, 3.

VALIDITY. See MORTGAGES, 5; STATUTES, 9.

VALIDITY OF ELECTION LAWS. See CONSTITUTIONAL LAW, 1, 2.

VEIN. See MINES AND MINERALS, 1.

VENDOR AND PURCHASER.

1. REMEDIES OF VENDOR—ACTION FOR PURCHASE MONEY—TENDER OF CONVEYANCE.

In an action by the agreed vendor of realty for the unpaid balance of the price, the averment in the complaint that plaintiff was and had been ready to convey, as agreed, upon performance of the contract by defendants, with an offer to deliver conveyance into court, was a sufficient tender. *Southern Pacific Co., v. Miller*, 169.

2. REMEDIES OF VENDOR—LIABILITY OF PURCHASER'S ASSIGNEE.

Where land was sold under contract providing that the agreement should bind the successors, heirs, and assigns of the parties, an assignee of the purchasers, who was not a party to the contract and did not execute, sign, or receive it, was not liable to the vendor for the unpaid balance of the price, since the promise of a purchaser of land to pay therefor cannot be enforced against his assignee, either in an action for specific performance or for damages, in the absence of agreement to that effect by the assignee. *Idem*.

3. REMEDIES OF VENDOR—RECOVERY OF PURCHASE MONEY.

Under Rev. Laws, 5501, limiting the remedy of a mortgagee to an action in foreclosure, where plaintiff, by executory contract, agreed to sell land, retaining title and reserving the right to maintain a suit for the foreclosure of the agreement and any equity of redemption of the purchasers, although, pursuant to the contract, the purchasers went into possession, plaintiff could recover in a personal action for the unpaid balance of the purchase price, not being restricted to an action for foreclosure, as it was not a mortgagee, because a mortgagor holds legal title, and a mortgage only an equitable lien. *Idem*.

VERDICT. See CRIMINAL LAW, 28, 29; HABEAS CORPUS, 1; LIBEL AND SLANDER, 3.

VOLUNTARY CONFESSION. See CRIMINAL LAW, 8, 11; WITNESSES, 2.

VOLUNTARY SURRENDER. See HABEAS CORPUS, 7.

VOLUNTEER. See SUBROGATION, 1.

VOTERS. See ELECTIONS, 2, 3.

WAIVER. See MECHANICS' LIENS, 5, 12, 13.

WAIVER OF DEFECT. See INDICTMENT AND INFORMATION, 1.

WAIVER OF DEFECT IN NOTICE OF APPEAL. See APPEAL AND ERROR, 29.

WAIVER OF PRELIMINARY EXAMINATION. See CRIMINAL LAW, 25.

WAIVER OF UNDERTAKING ON APPEAL. See APPEAL AND ERROR, 28.

WANT OF PROSECUTION. See DISMISSAL AND NONSUIT, 1, 2, 3.

WARRANT. See HABEAS CORPUS, 2, 4.

WASTE. See LANDLORD AND TENANT, 1.

WATER AND WATERCOURSES.

1. IRRIGATION—LICENSE—EVIDENCE, SUFFICIENCY OF.

Evidence. In an action to enjoin defendant's use of a ditch to conduct water to his ranch, in which defendant claimed an irrevocable license to use the ditch, *held* to justify a judgment for the plaintiff. *Gault v. Grose*, 274.

WEAPON. See CRIMINAL LAW, 12.

WEIGHT OF EVIDENCE. See CRIMINAL LAW, 30; EVIDENCE, 4.

WIFE'S INTEREST. See HOMESTEAD, 1.

WILLS.

1. CONSTRUCTION—"BEQUEATH" DISTINGUISHED FROM "DEVISE."

The word "bequeath" is generally used to express a gift of personalty made in a last will, and the word "devise" is a term generally used to express a gift of realty made by will. *In Re Estate of Lewis*, 445.

2. CONSTRUCTION—INTENTION OF TESTATOR.

The cardinal rule in the interpretation of wills is to ascertain the intention of the testator. *In Re Hartung's Estate*, 200.

3. CONSTRUCTION—"RESIDUE"—"RESIDUARY LEGATEE"—"RESIDUARY BEQUEST."

Under such will, the order was not a "residuary legatee," as the term "residuary bequest" means that the residue of an estate is bequeathed to a person absolutely, and as there can be but one "residue" of an estate, meaning what is left after the payment of the debts and general legacies and the satisfaction of other specific gifts. *Idem*.

4. CONSTRUCTION—TRUST—INCOME.

Under such will, in which the devise was unlimited as to time, the rule that a gift of the income of a fund without limit as to time will pass the fund itself did not apply, as it was the testator's intention, in case the order did not build the home, to create an active trust, the trustees to manage the *corpus* of the trust fund and pay over the proceeds thereof annually to the order as long as it maintained the home. *Idem*.

**WILLS—Continued.****5. CONSTRUCTION OF DEVISE—INCOME OF ESTATE.**

Under a will devising the residue of an estate to the Independent Order of Odd Fellows, the income therefrom to be paid over by the executors and trustees annually, if within five years from testator's death the order established a home for orphans in a certain place, to be known by a certain name, with devises of the estate over in the contingency that the order should not accept such condition, it was the testator's intention that the order, if it established such a home within such time, should receive only the income of the estate. *Idem*.

**6. DEATH OF DEVISEE—RIGHTS OF HEIRS—STATUTES—"DEVISEE"—"DEVISE"—"LEGATEE"—"LEGACY."**

Under Rev. Laws, 6219, continued practically in the form in which it was enacted in 1862, providing that when any estate shall be devised to any relative of the testator and the devisee shall die before the testator, leaving lineal descendants, they shall take such estate as the devisee would have taken had he survived the testator, and in view of the specific use of the terms, "devises," "legacies," etc., in section 6205, and the specific and correct use of the words "devisee" and "devisor" in section 6220, and in the absence of an interchangeable or indiscriminate use of such terms in the statute, the words "devisee" and "devise" are not to be given the scope of "legatee" and "legacy," and do not comprehend the disposition of personal property; so that, where a will gave and bequeathed the residue of all property of testatrix to a relative and her daughter and the devisee predeceased the testatrix, the daughter was entitled to all the residue of the realty, and to one-half the residue of the personal property, but as to the other half of the residue of the personal property, the testatrix died intestate. *In Re Estate of Lewis*, 445.

**7. RESIDUARY BEQUEST—INCOME.**

A residuary bequest contingent in terms generally carries the intermediate income, which is not disposed of, but accumulates. *In Re Hartung's Estate*, 200.

**WITHDRAWAL OF PLEA.** See CRIMINAL LAW, 2, 21.

**WITNESSES.****1. CROSS-EXAMINATION—SCOPE.**

In a personal injury action, wherein one element of plaintiff's damages was inability to work, exclusion of evidence as to the name of a person from whom he borrowed a certain sum of money was erroneous. *Zelavin v. Tonopah Belmont*, 1.

**2. IMPEACHMENT—INCONSISTENT STATEMENTS—VOLUNTARY CONFESSION.**

One accused of crime who takes the stand as a witness cannot be impeached by proof of a confession which would be inadmissible as direct evidence because made while under arrest, and not shown to have been voluntary. *State v. Wilson*, 298.

3. REDIRECT EXAMINATION—CONVICTED JOINT PRINCIPAL—OFFERS OF CLEMENCY.

On a murder trial, where, on cross-examination of a witness who had been previously convicted as joint principal in the crime on a separate trial, the defense asked him whether he had talked with the county officers including the district attorney, it was a proper exercise of the court's discretion to allow the state on redirect examination to ask the witness whether he had not been informed that no clemency would be extended to him for testifying in the case, since the inference that offers of clemency had been made might have arisen from such previous question by the defense. *State v. Tranmer*, 142.

See CRIMINAL LAW, 10, 17, 18, 31; COSTS, 2, 6; EVIDENCE, 4; HABEAS CORPUS, 6.

WRIT OF PROHIBITION. See CONSTITUTIONAL LAW, 1, 2.

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